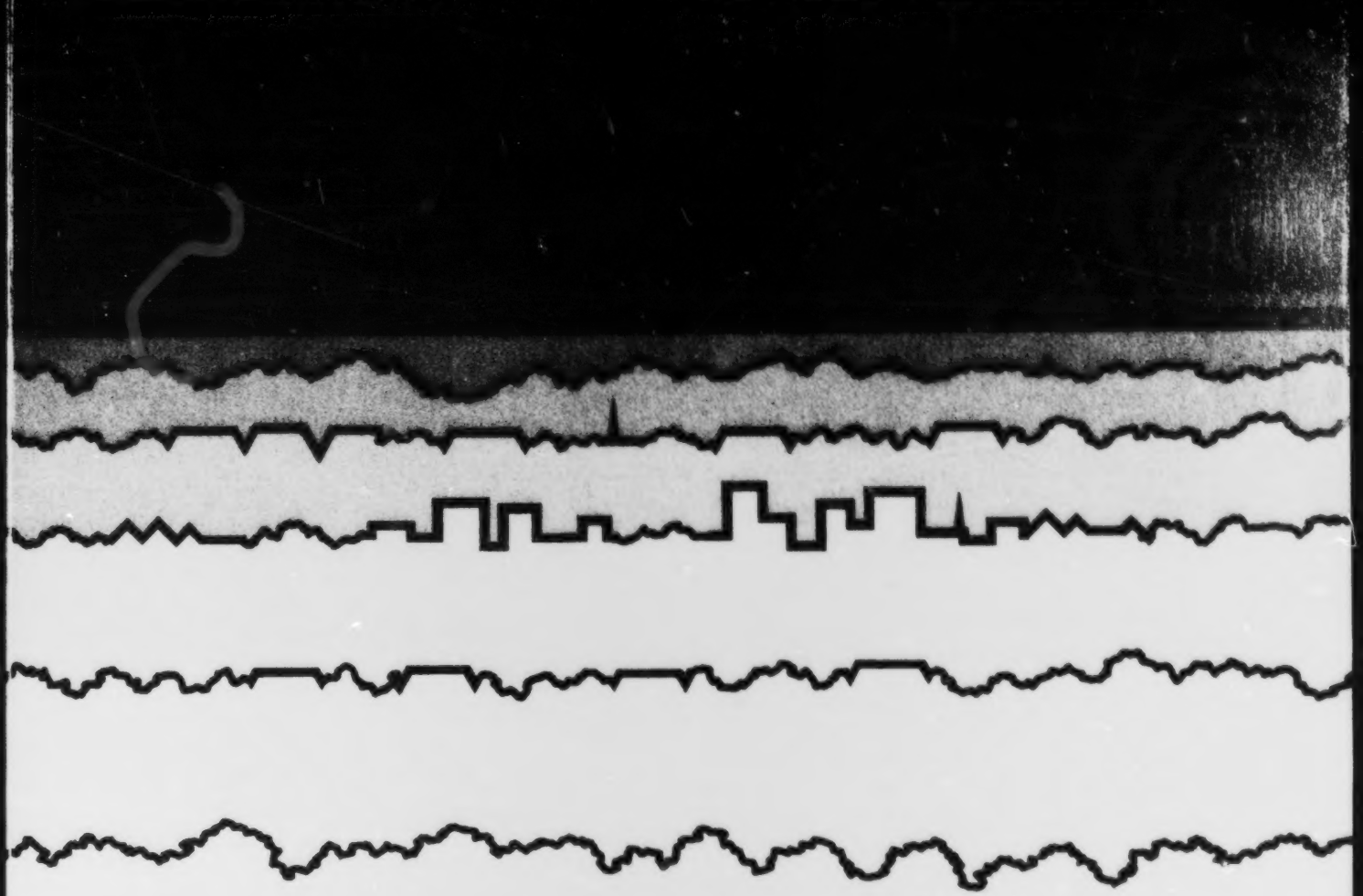
CEARC Canadian Environmental Assessment Research Council

CCREE Conseil canadien de la recherche sur l'évaluation environnementale



THE PLACE OF NEGOTIATION IN ENVIRONMENTAL ASSESSMENT

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THE PLACE OF NEGOTIATION IN ENVIRONMENTAL ASSESSMENT

A Background Paper Prepared for the
Canadian Environmental Assessment Research Council

FOREWORD

This background report deals with an area of growing interest to the environmental assessment community. Negotiation and mediation methods are being applied or are under consideration in a number of Canadian jurisdictions. If this trend continues, practitioners and administrators will have to integrate alternative means of dispute settlement with more traditional procedures for impact analysis, public consultation, and decision making.

A number of conferences and seminars have already been held to examine the policy options for environmental mediation. The present proceedings focus on questions associated with the institutionalization of this and related processes.

Organized by the Canadian Environmental Assessment Research Council (CEARC) through its Social Impact Assessment (SIA) Committee, this analysis is part of a three-year research program on the social component of environmental assessment. It extends, in particular, the priority given to analysis of institutional arrangements outlined in *Social Impact Assessment: A Research Prospectus*. Those interested in receiving further information on SIA and other research initiatives of the Council should write to:

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COMMON GROUND:
ON THE RELATIONSHIP OF ENVIRONMENTAL ASSESSMENT AND NEGOTIATION

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INTRODUCTION

Environmental assessment is often characterized by conflict and controversy. Many of the projects and activities subject to assessment are the focus of disputes involving government, industry, environmental organizations, and local communities. This is an inevitable consequence of the differences in values and interests that exist in a pluralistic society with respect to the use and management of land, water and other natural resources. Dispute settlement is usually difficult to achieve for two inter-related reasons: first, the benefits and costs of development are unevenly distributed and include intangibles that are hard to evaluate and compare; and, second, many affected and interested parties with diverse views and interpretations are often involved.

Facility siting, the process of locating regionally necessary but locally unwanted projects, is a well-documented example of these problems. Almost inevitably this process generates a climate of conflict known as the NIMBY (Not In My Back Yard) Syndrome. But the intensity and persuasiveness of conflict over facility siting and other forms of development cannot be explained just by reference to parochial self-interests. NIMBY issues are founded on more widespread doubts about the fairness and effectiveness of existing processes of decision making (Armour 1983). Public concerns tend to focus on the ways in which community values and environmental interests are incorporated, evaluated, and often discounted within traditional approaches to facility siting and project development. This perceived bias in assessment, planning, and regulatory procedures tends to be self-perpetuating; it creates a cycle of conflict which continues from project to project and is difficult to break (Sadler 1983).

As a result, there is a growing interest in Canada in alternative forms of dispute settlement. These encompass non-adversarial methods designed to involve contending parties in direct negotiation to try to reach a mutually acceptable solution of the issues at stake. One particular approach, environmental mediation or multi-party negotiation conducted with the assistance of a neutral third party, has gained considerable profile in the United States (see Bingham 1986). It has been applied to a range of policy-oriented and project-specific issues of the type that are subject to some form of environmental assessment in Canada. Considerable potential and scope exist for the productive employment of mediation and other consensus-seeking procedures within this process (Shrybman 1984; *Resolve* (18) 1986; *Canadian Environmental Mediation Newsletter* (1) 1986). However, important questions remain about the pros and cons of institutionalizing these measures within Canadian systems of decision making (Sadler 1986a).

These issues were identified by the Canadian Environmental Assessment Research Council (CEARC), through its Social Impact Assessment (SIA) Committee as a timely and important area for further attention. A round table on the role and place of negotiation in environmental impact assessment (EIA) was organized as a first step in problem review and identification of research opportunities and options. It was designed to bring together EIA practitioners and administrators and specialists in negotiation-based approaches to dispute settlement.

The objectives of the round table were:

- to analyse the ways and means by which negotiation might operate within EIA processes; and
- to clarify the roles and responsibilities of the parties involved.

The organization of the proceedings of the round table reflect the main phases of activity.

- A formal agenda for the round table was drafted by the conveners and circulated to all invited participants. It forms the basis of the present introductory chapter, which sets out the rationale and framework for the analysis.
- Several theme papers and commentaries were commissioned and distributed in advance to help focus discussions. These constitute the main body of the text in this volume.
- The round table was structured to try and encourage in-depth discussion of the main themes of the workshop. A synopsis of the dialogue follows the papers and commentaries.

- Final conclusions and recommendations on future directions for research in environmental assessment and negotiation were prepared by the SIA committee. These are supported by an appended case study of the possibilities for building a mediatory process within the federal Environmental Assessment and Review Process (EARP).

BACKGROUND TO THE ANALYSIS

Environmental assessment is an important instrument for planning and control of development activities. A number of systems for the conduct of this process have been established in Canada by the federal and provincial governments (Couch 1985). Some of these are declared through policy, operate under relatively informal administrative procedures and emphasize a planning-type approach. Others are based on statutes, incorporate formal quasi-judicial rules of review procedure and conform to a regulatory model. This approach to EIA overlaps with the processes for project approval and development control followed by the National Energy Board (NEB) and similar bodies that predate the institutionalization of EIA but have been profoundly affected by it (Hunt, Rounthwaite, and Saunders 1985).

Recent evaluations of Canadian and international experience with EIA and project review have identified a number of problem areas, including their effectiveness in satisfactorily resolving the issues in dispute (Sadler 1987). The rationale for considering alternative approaches to the conventional, technically-based process rests on the difficulty of the latter in coping with the realities of contemporary environment-development conflicts, which are increasingly socio-political in nature. During the last 15 years, environmental assessment has expanded progressively in scope to try to accommodate public concerns. This adjustment has occurred without major change to the structure of the process. It is open to question: first, how much longer this can continue with respect to NIMBY-type issues? Second, on this basis, what are the options for institutional reform?

The Socio-Political Realities of Environment-Development Conflict

Today, disputes over proposals for site facilities and projects differ significantly from those which occurred in the 1970s, when EIA processes were institutionalized. Opposition to certain development activities is no longer a case of environmentalists versus industry. The range of concerns and interests involved have broadened considerably to include quality of life issues, institutional and procedural matters, and moral and ethical questions.

These concerns are hard to deal with because they are rooted in and reinforced by a broader set of inter-related social forces, noted below.

- *The rise of the watchdogs.* As a result of the environment and participation movements, individual citizens and local communities, as well as environmental nongovernmental organizations, are more adept at pursuing their interests, less intimidated by technical expertise, and fully capable of challenging findings, questioning underlying assumptions, and mounting strong counter-arguments.

- *Unease regarding science and technology.* The social and political fallout from the Bhopal and Chernobyl disasters and other accidents and near-emergency events has coloured the public view of waste and hazardous facilities so that these are often assessed in terms of worst-case scenarios rather than on their own merits.

- *Concern for health and lifestyle.* Local opposition to the siting of hazardous facilities is increasingly motivated by perceived risks to individual health, community well-being, and public safety.

- *Loss of trust in proponents and regulators.* This is both product and cause of the increased concern and capability of environment and community interests; it has focused attention on the fairness and effectiveness of existing processes of environmental assessment and project decision making.

The NIMBY syndrome represents, in effect, a crisis of confidence in the capability of government and industry to deal with risk, uncertainty, and conflict. It incorporates an indictment of the technical basis of environmental assessment and project approval processes and challenges traditional modes of public review and consultation. A concerted effort has been made in recent years by both proponents and regulators to improve the technical rigour of EIA and to broaden the opportunities for public involvement in review processes. This approach, ironically, has served as much to intensify as reduce the potential for conflict, for the reasons discussed next.

Institutional Implications

The socio-political realities surrounding conflict over development proposals has a number of institutional implications for the design and administration of environmental assessment and review processes. Because basic differences in interests and values are involved, environment and development issues are not matters of misunderstanding that can be cleared up by additional information (which is the usual reaction of the beleaguered technocrat). Such issues become exposed but not resolved through environmental assessment and project review. Public hearings or meetings, the standard participatory instruments used in these processes, are helpful in gaining a better understanding of what is at stake, but typically they involve minimal interaction and dialogue, in the real sense of the term, among contending parties (Sadler 1979).

All hearings, irrespective of whether they are based on formal or informal processes, tend to be adversarial in nature. They are structured to allow proponents and intervenors to state their respective cases and try to undermine that of their opponents. Much of the discussion at environmental reviews is focused on the deficiencies of the impact statement prepared by the proponents. The proceedings thus can become acrimonious and time-consuming, and often end with proponents and opponents of development proposals locked in fixed positions. Environmental reviews have thus been called a "dialogue of the deaf," characterized as much by a capacity

to delay and obstruct as to positively influence the location and design of projects and activities (Sadler 1986b). In some cases, the process is commandeered by a small coterie of well-organized groups with few claims to wider representation of public values. The emerging issue, in the view of some observers, is how to deal with a determined minority rather than with a reluctant proponent or a cautious regulator (Nelkin 1982).

The above discussion does not constitute a blanket argument against traditional participatory approaches used in EIA and project review. It does emphasize their serious limitations as mechanisms for *resolving* conflict. Environmental hearings, from this standpoint, constitute a zero-sum game, i.e., there are clear winners and losers (Raifa 1982). The process channels arguments along for-and-against lines, exaggerates rather than reconciles differences, and leaves it to a review board or panel to rationalize the evidence and make decisions or recommendations on whether and how a proposal should proceed. Such an approach can serve the public interest, and will undoubtedly remain an important part of government machinery for environmental assessment and project review. It should not, however, be seen as the *only* model for this purpose. Other alternatives to the hearing format and its variants can be used in support of EIA of development proposals.

Alternative Means of Dispute Settlement

As used here, the term "alternative means" refers to various collaborative processes through which parties to a dispute explore and try to resolve their differences. This approach is founded on the assumption that the disputants themselves are best able to judge what the issues are and how to settle them. It is characterized by a voluntary commitment to joint problem solving by direct face-to-face negotiation between the parties involved, and by a deliberate attempt to build consensus and reach a mutually acceptable agreement. Collectively, these characteristics distinguish negotiation approaches from more extended consultation techniques, such as multi-party workshops or advisory groups.

The U.S. experience with negotiatory approaches suggests that they can lead to the timely and equitable settlement of environment and development disputes (Bingham 1986). Environmental mediation, in particular, has shown promise in dealing with the facility siting dilemma. It offers an alternative to the traditional approach, which Dusick and others have called DAD —decide, announce, and defend (Susskind 1985). A number of U.S. states (e.g., Massachusetts, Rhode Island, and Wisconsin) have passed legislation that authorizes or requires hazardous waste siting facility disputes to be mediated or arbitrated. Negotiations focus on ways and means of mitigating and managing environmental risk and on determining the amount and type of compensation that will be given to those people adversely affected by a facility. At the federal level, the United States Environmental Protection Agency is using facilitated negotiation to supplement the current approach to drafting regulations. Several experiments with this process have concluded successfully and the Agency views negotiation as holding considerable promise as an effective and efficient way of setting environmental standards (U.S. National Institute for Dispute Resolution 1986).

Similar innovations are underway in Canada, although on a narrower front and on a less explicit basis. Examples of negotiation and mediation approaches pursuant to the processes administered by the Alberta Energy Resources Conservation Board, the Ontario Environmental Assessment Board, and the Quebec Bureau d'audiences publiques sur l'environnement are introduced in subsequent papers. A related option, which is the subject of interest by proponents of development, is the negotiation of impact management agreements with affected interests. Ontario Hydro concluded four such agreements with local municipalities in the late 70s and early 80s. All of these projects, including two nuclear generating stations, were exempted from the provisions of the provincial environmental assessment and review process. This approach was subject to criticism at the time and the circumstances called for the utility to make a particular effort at responsive implementation (see Baril (1983) for details). It will be useful, accordingly, to monitor and evaluate the results of this approach and compare them to other approaches to impact management, mitigation, and compensation such as those adopted by Hydro-Québec (1986).

On the basis of recent experience, it is apparent that there are a number of options for linking negotiation and mediation to environmental assessment.

- A radical position would involve restructuring EIA as a joint fact-finding phase in a negotiation process (Susskind 1984). This approach might be aimed, for example, at the conclusion of a development package or impact management agreement between community and proponent, *à la* Ontario Hydro. It would explicitly recognize that the conflicts surrounding facility siting lie not only in new socio-political realities but are also imbedded in the very structure of the environmental assessment and project approval process.

- Less avant-garde is the substitution of mediation as an alternative to public hearings in certain well-defined circumstances (see Appendix I). This approach seems particularly suited to medium-scale proposals in which the issues and interests are reasonably limited. In the event of an agreement not being reached, the proposal would be subject to hearing and adjudication in the prescribed manner.

- Finally, negotiation procedures can be used to supplement and improve the effectiveness of EIA at key stages in the process (Sadler 1986b). This approach, for example, might be productively employed at the following stages:

  (i) scoping issues;

  (ii) determining terms and conditions for mitigation and compensation; and

  (iii) establishing the parameters for structured discussion of technical questions of risk and impact at public hearings.

THE SCOPE OF REVIEW

A conservative view generally tends to be taken in Canada of the role and place of mediation and negotiation in environmental assessment and decision making. The emphasis in thinking and practice in so called alternative approaches is on their use as supplements to existing processes rather than substitutes for them. In this context, the institutional considerations of how to incorporate negotiation and mediation within existing systems of environmental assessment and management become particularly important. This represents the point of departure for the papers and discussions that follow and exemplify different provincial contexts and institutional experiences in Canada and compare them to the situation in the United States.

Organizing Themes

At present, there is relatively limited formal experience in Canada with multi-party environmental mediation or bi-lateral negotiations between proponents and communities to secure impact management agreements. The first order of business is, therefore, to gain a clearer picture of contemporary practice and to distinguish among different types of negotiation approaches. What, for example, is the contemporary role of negotiation and mediation as defined here, and how does this relate to more generalized and implicit processes of bargaining and compromise that political scientists and others have long recognized as characteristic of environment and resource decision making? A selective survey of Canadian experience in this policy arena is provided in Dorcey and Riek's paper. It illustrates the scope and style of negotiation-based approaches used in support of environmental assessment, planning, and regulation. With the qualifications introduced by Cormick and McTaggart-Cowan, the analysis by Dorcey and Riek makes a case for formalizing and extending this approach to dispute settlement. This analysis may be envisaged as providing an extended and in-depth context for the round table discussion of how to accommodate negotiation and mediation within EIA and project review.

A number of constraints on this course of action have already been identified, including the well-established Canadian tradition of bureaucratic and political caution in undertaking institutional change. Most reforms take place within the margins of the *status quo*. These and other issues in the institutionalization of negotiation and mediation within the EIA process are critically examined in Emond's paper. In his view, the fundamental question remains whether, rather than how, this should take place. Existing processes are considered to have structural flaws and organizational rigidities that impede the creative employment of alternative modes of dispute settlement. On pragmatic grounds, however, negotiation is recognized as a potential means of enhancing the credibility of the EIA process. The commentaries by Beauchamp and Jeffery, who respectively chair the Quebec Bureau d'audiences publiques and the Ontario Environmental Assessment Review Board, lend weight to this pragmatic view and introduce additional qualifications on the basis of the administrative and statutory procedures employed in each province.

Finally, the conduct of negotiation, however it is conceived and incorporated within EIA, will require the development of clear ground rules that are well understood and accepted by all participants. At present, the procedures governing such processes are *ad hoc* and informal, reflecting their case-specific evolution. What is called the accountability dilemma in the literature of environmental conflict resolution focuses attention on the role and responsibilities of the mediator and his/her relationship to the disputants, and by extension, their relationship with EIA administrators who have prescribed responsibilities and duties under statute or policy. This issue is reviewed by McGlennon and Susskind, who describe the protocols and principles that guide the conduct of environmental mediation in the United States. Their analysis is extended to Canadian institutional realities in the commentaries by Millard and Isaacs, who bring the different concerns and criteria of the administrator and the intervenor to bear on questions of accountability.

Questions for Further Discussion

The papers and commentaries noted above provided the basis for discussion at the round table. Opening statements were made by the authors followed by a dialogue among participants. Each organizing theme was the subject of a separate round of discussion, lasting approximately two and one-half hours. A checklist of questions was circulated in advance to round table participants, and used to structure discussion. It is reproduced below to provide a frame of reference for the collected papers and the summary of proceedings that concludes this volume. The questions also facilitate comparison between our initial scoping of the issues and those that round table participants and discussants felt to be particularly important.

1. On the Status of Environmental Negotiation in Canada

What role should negotiation processes currently play in environmental planning, assessment, and regulatory frameworks for decision making?

How might existing roles and relationships be improved or extended?

Which types of dispute seem to be amenable to negotiation?

When and where should this process occur in relation to decision making?

How can we capitalize on leading trends and emerging issues associated with case experience in environmental mediation and related procedures?

What are the prospects for the widespread adoption of this approach?

2. On the Accommodation of Negotation within EIA Processes

Should environmental negotiation and mediation be formally institutionalized? If so, how? By amending existing policies or legislation? By introducing new regulatory procedures ? In either case, what kinds of changes in environmental planning

and regulation are needed to ensure that the public interest is served by the use of alternative means of dispute settlement?

Where within existing organizational arrangements should authority for such processes reside? Is there a need to restructure and redefine the roles and duties of hearing boards, government departments, and agencies?

Should negotiation and mediation be made adjuncts to existing public hearing procedures or should they be established as independent processes? What status should negotiated agreement have at a public hearing?

3. On the Responsibilities of Parties Participating in Negotiation and Mediation

How should accountability for decisions be built into the process?

How should parties to the negotiation/mediation process be identified?

What constitutes fair and due process?

What is the acceptable balance between matters of confidentiality and matters requiring public scrutiny?

What is the accountability of a mediator and to whom?

How does this notion relate to the powers and duties of officials responsible for the conduct of EIA?

What safeguards are needed to protect the rights and interests of all participants, including those not represented at the negotiating table?

RETROSPECT AND PROSPECT

The final session of the round table was designed to consolidate discussion and to review future directions for linking environmental assessment and negotiation. In the summary of proceedings that concludes this volume, areas of agreement and disagreement on these topics are identified. Round table participants, collectively, took a cautious view of both progress to date with the processes of mediation and negotiation and the prospects for their future deployment in environmental assessment and related areas of decision making. The sense of the discussion with respect to the potential of alternative means of dispute settlement was certainly more restrained than that found in the literature of the field (which is largely written by practitioners and academics who are committed to the promotion of mediation and negotiation).

Based on the round table discussion, the SIA Committee of Council prepared a series of recommendations on research directions for incorporating negotiation-based approaches within the EIA process. Experimentation, supported by evaluation, is the approach promoted by the Committee. This strategy reflects, first of all, the reservations held about the introduction of negotiation-based approaches by EIA administrators, project proponents, and non-government organizations. Second, it is based on the understanding that these will only be answered through concrete demonstration of the pros and cons of negotiation and mediation rather than more desk-based analysis. Several carefully designed pilot projects should pay considerable dividends in terms of gaining a better understanding of how mediation might be applied and adapted within the different institutional arrangements for environmental assessment and management developed by the federal and provincial governments.

CEARC may be able to make a particular contribution to advancing the state-of-the-art of conflict resolution. The round table on institutional considerations, in linking environmental assessment and negotiation, brought together key actors with different stakes and views to try and hammer out some common ground on the subject. It is just as useful, in some respects, to know on what points people disagree. Further progress in the use and employment of negotiation and mediation processes in support of environmental assessment and related processes will require a similar approach. These processes, by earlier definition, are voluntary and collaborative in nature. All parties to a dispute must buy into negotiation and mediation for it to work. The papers, commentaries, and discussion in this volume provide a perspective and a prospective on the practicalities of linking environmental assessment and alternative forms of dispute settlement.

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NEGOTIATION-BASED APPROACHES TO THE SETTLEMENT OF ENVIRONMENTAL DISPUTES IN CANADA

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Bargaining and negotiation have always been involved in settling environmental disputes in Canada. Only in recent years, however, has this been explicitly recognized and attention given to ways in which they could be better utilized in the governance of natural resources (Dorcey 1986). This paper examines the nature and scope of environmental disputes, the governance processes that have been used in managing environmental resources, the negotiation mechanisms that could potentially be used to solve disputes, and how they fit into governance processes.[1] We then summarize 32 case studies of negotiation for resolving environmental disputes in Canada and determine what factors might contribute to negotiation success.[2] Finally, we suggest future directions for research and guidelines for continued experimentation with negotiation-based approaches in Canada.

THE NATURE AND SCOPE OF ENVIRONMENTAL DISPUTES

Substantive and Process Issues

Environmental disputes arise as both substantive and procedural issues and the two are often intertwined. Within existing institutional arrangements for the governance of natural resources in Canada, substantive disputes arise about four sets of issues:

- *project development and resource use effects*, such as the downstream effects of treated versus untreated municipal waste discharge on a salmon fishery or the impact on a wilderness environment of scientific research and recreational uses;
- *multiple use of resources and areas*, such as the use of forests for timber and wildlife production or the use of the resources in a region for a diversity of industrial and recreational developments;
- *regulations, policies, and legislation*, such as regulation relating to the maximum concentration of a material allowed in a waste discharge, government policies with regard to the development of new energy sources and energy conservation measures, or the content of new toxic materials control legislation; and
- *resource ownership and jurisdiction*, such as claims for aboriginal title or federal and provincial claims to offshore resources.

Environmental disputes also arise as procedural disagreements about who should be involved, how and when in making decisions about these substantive issues. Thus in the example of the dispute about the downstream impacts of municipal waste discharge, there may be disputes about which interests and experts should be involved in assessing the impacts and the ways to mitigate them; which people should be involved in joint task-forces and/or public hearings; when the interested parties and/or experts should come together; and who should be involved in determining compensation for fishery losses.

Not only are substantive and procedural disputes often intertwined but in specific instances all four types of substantive disputes might arise. For example, a proposal to develop offshore oil could give rise to disputes about the environmental effects of the project, implications for future uses of the coastal area, the adequacy of construction and operation regulations, the relationship to energy development policy, and ownership of offshore resources.

Increasing Frequency of Conflict

Increasing demands, complexity, and uncertainty have in recent years generated increasing conflict in the use and governance of natural resources. Demands for the use of natural resources have intensified and diversified greatly over the last two decades. Development has spread into the North and into the coastal zones of the Arctic, Atlantic and Pacific, and settlement has expanded throughout Canada. Congestion has increased and expansion has generated conflicts both between and within resource sectors and areas of the country. For example, conflicts arise between the forestry and fishery sectors over habitat damage, within the sectors over the allocation of timber and fish supply, and between areas over the siting of new mills and salmon enhancement facilities. Development has greatly increased the interdependence of both biophysical and socio-economic systems, as illustrated by the emergence of toxicity problems in the Great Lakes and the reverberations from oil price changes. Recognition of this growing complexity has been accompanied by the realization that there is only limited knowledge of how biophysical and

1 This paper extends earlier analyses of bargaining in the governance of natural resources. For further information, see Dorcey (1986).

2 This information is taken from Dorcey and Riek (1987), which provides a more detailed analysis of Canadian negotiation experience in settling environmental disputes.

socio-economic systems behave and that there will be continuing uncertainties about their behaviour. Together, increasing demands, complexity, and uncertainty have greatly increased conflicts in recent years.

Elements of Conflict

Environmental disputes are likely to include elements of cognitive, value, interest, and behavioral conflict. Although in a particular situation these elements are difficult to separate completely, major differences can usually be identified.

- *Cognitive conflicts* are rooted in different understandings of the facts, as for example, when the environmental interest group and the hydro-electricity authority disagree on how much land will be flooded by the new reservoir.
- *Value conflicts* stem from different preferences about the outcome. Thus, while there may be no disagreement about the size of the reservoir, the environmentalists may disagree with hydro about the desirability of forgoing agricultural and wildlife production for electricity production.
- *Interest conflicts* occur when there are disagreements about the distribution of the costs and benefits. Hence, although the dispute over the value effects of developing the reservoir might be resolved, there may still be conflicts over who should incur the costs and who should reap the benefits and to what extent.
- *Behavioral conflicts* are rooted in the personalities, experiences, and circumstances of the interested parties. Even though all parties desire a settlement of the dispute, it may elude them because of the variety of behavioral factors that influence their interactions. Thus despite the best efforts of the people in hydro, it may initially prove impossible to settle the dispute because the president of the environmental coalition is an aggressive lawyer who feels that she was tricked during discussions over a previous reservoir development, and believes that the government has initiated discussions in order to diffuse the success of a media campaign and a threatened court case.

EVOLUTION OF DECISION MAKING IN THE GOVERNANCE OF NATURAL RESOURCES

Modes of Decision Making

In principle, three modes of decision making used in settling environmental disputes can be distinguished: authoritative, consultative, and negotiative.

- *Authoritative decision making* occurs when an individual or organization makes trade-offs alone and imposes the decision on others. For example, the director of the pollution control agency orders the municipality to install a treatment plant; the environmental assessment board approves construction of the dam; and the court rules that the native Indian band has rights to the fishery that must be recognized by the company proposing to log the valley.
- *Consultative decision making* occurs when an individual or organization consults with other individuals and organizations before making the trade-offs and imposing the decision. For example, the ministry of environment holds public hearings to obtain comments on draft regulations before they are adopted; the environmental monitor for the project discusses the proposed relocation of the road with the company's consultants before responding to their request; and the minister appoints a committee to advise him before adopting a multiple-use plan for crown lands.
- *Negotiative decision making* occurs when individuals or organizations make the trade-offs among themselves and adopt an agreement. For example, the housing developer and the neighbouring farmer agree to jointly fund the construction and landscaping of a berm around the site; the municipality, the toxic waste disposal company and the residents' association negotiate an agreement to establish a compensation committee to settle any further accidents; the provincial and federal governments negotiate an accord that establishes a regime for regulating the development of coastal resources.

Decision-Making Processes

In practice, all three modes of decision making are used in the governance of natural resources. As a response to increasing conflict, there has been growing interest in and explicit use of consultative and negotiative modes of governance:

- *Referral processes* have been established within government to insure that applications for leases, licences, and permits (e.g., a crown foreshore lease, a tree farm licence, or a waste management permit) are circulated to other interested agencies to provide early information about a proposed development and the opportunity to comment on it.
- *Guidelines* have been developed both to detail procedures for the referral (e.g., information to be included, who is to receive it, types of response, and time allowed) and to provide substantive standards and criteria to be applied in making decisions on leases, licences, and permits (e.g., minimum conditions to be met by discharges to lakes and rivers used for water contact recreation).
- *Task forces* have been struck on numerous occasions to provide temporary means to facilitate more intensive discussions between affected interests. They range in type from small groups within a government agency (e.g., to determine the response to a new kind of project), through larger intergovernmental groups, which may include nongovernmental interests (e.g., to settle multiple use conflicts in a small valley), to public inquiries (e.g., to settle multiple use conflicts in a small valley or to propose policies for developing uranium mining).
- *Impact assessment processes* have been created to provide permanent and more formal procedures for reviewing various types of projects, usually including provisions for public hearings. For example, the federal government and the Province of Ontario have established processes for

selected government projects, and the Province of British Columbia has separate processes for reviewing mines and energy projects.

- *Planning processes* have been developed for both resource sectors and geographic areas to provide a context for specific developments. Single-sector plans may include comprehensive consideration for whole provinces (e.g., provincial forest plans in British Columbia) or for smaller areas (e.g., regional plans for water resources). In some cases, usually sub-provincial areas, several related sectors are integrated (e.g., strategic environmental plans for water, fish, wildlife, and air resources in British Columbia). On other occasions, plans are developed for regions, again usually smaller areas, that integrate all uses (e.g., Ontario's strategic regional land-use planning).

- *Interagency committees* have been established as a continuing means to formally bring together governmental interests in resources governance (e.g., the provincial Interdepartmental Land Use Committee in Newfoundland, or the Management Committee for the Fraser River Estuary, composed of federal and provincial agencies, regional districts, municipalities, and Indian bands).

- *Special purpose organizations* have, on occasion, been created to provide permanent bodies with a mandate for a variety of resource interests in a specific area to formally act together (e.g., the Islands Trust for the Gulf Islands of British Columbia).

The last 20 years has thus seen remarkable innovation in creating processes that utilize consultation and negotiation within the traditional authoritative framework of natural resources governance and that are designed to provide more comprehensive, anticipatory, and strategic approaches. They have become progressively more permanent and formal. Slowly, ideas have emerged as to how they can be nested together in a more productive hierarchy of mechanisms. Only 20 years ago, a proposal to build a dam would have been largely considered through *ad hoc* processes with relatively little formal consultation among the interested parties either inside or outside of government. Today, it would likely be routed through various referrals and guidelines into specific impact assessment processes; probably involving a variety of task forces and considered in the context of various sectoral and area plans; likely being submitted to some judicial or quasi-judicial board for final adjudication; and through these processes many different interests would be consulted.

However, one process that has not changed is the reality of the bargaining and negotiation that goes on all the time in the governance of natural resources. No matter what *in principle* might be the mode of decision making, *in practice* there always has been and always will be bargaining and negotiation. Snapshot views of decisions being made by the courts, cabinet, legislature, boards and bureaucracy give a false impression of authoritative decision making. When the dynamics of decision making are observed and seen in their longer term context, the ubiquitous presence of bargaining and negotiation becomes evident. Authoritative decisions are then seen as points in bargaining and negotiation that are implicit and unfolding over longer time periods.

This broader perspective has been dramatically evident in recent years with the federal and provincial governments, including Parliament and the Supreme Court of Canada, negotiating a new constitution and bill of rights. Those agreements are now being further refined by interpretations in the courts and by new legislation that in turn provides the context for the continuing evolution of the decision-making mechanisms employed in resource governance. From this perspective, the current resort to the courts by many native Indian bands involved in environmental disputes (e.g., logging on Meares Island and twin-tracking of the CN railroad through the Fraser-Thompson Canyon) is a strategy for supplementing and complementing short-term negotiations in administrative arenas with longer term actions in judicial and legislative arenas.

Although the scope of bargaining and negotiation is broad and occurs implicitly in the Canadian governance system, the focus of our analysis is on a smaller scale. Here, our primary concern is with the explicit use of negotiation, in which governments actively seek ways to reach negotiated solutions instead of exercising their legitimate powers to make authoritative decisions. The types of negotiation mechanisms that might be used and their role in governance processes are considered.

POTENTIAL NEGOTIATION-BASED APPROACHES

Potential Mechanisms

A wide variety of mechanisms have been discussed in the North American literature that could potentially be employed in negotiation-based approaches to settling environmental disputes. In this section, these mechanisms are defined and related to each other before we consider how they could potentially be used in the emerging systems of governance in Canada.

Negotiation is a process whereby two or more parties attempt to settle what each shall give and take, or perform and receive, in transaction between themselves (Rubin and Brown 1975: 2). While *bargaining* is often defined likewise and used synonymously, for many people it does not have the more principled connotations of negotiation. Bargaining is more readily associated with the image of people chasing bargains, throwing their weight around, taking partisan positions, scheming for advantage, horse-trading, back-scratching, log-rolling, jockeying, threatening, deceiving, lying, and bluffing (Lindblom 1965). In contrast, negotiation more easily conjures images of people searching for agreement, through courteous exchange, reasoning, persuasion and forming alliances. For these reasons, we have emphasized the ubiquitous practice of both bargaining and negotiation.[3]

3 To make clear when we are speaking about the intentional and overt use of a negotiation-based approach as opposed to the common and often implicit practice of bargaining and negotiation, we will refer to the former as the "explicit" use of negotiation.

Potential mechanisms can be placed on a continuum of approaches from unassisted negotiation to arbitration, reflecting the increasing extent to which they utilize a *third party* to assist in the process (Susskind and Madigan 1984). However, the same terms are often used differently by different authors. Below, a set of definitions is presented that will be used in this paper, and reference is made to authors who use the same or closely related terms in the same way.

The third party may also be called an *intermediary* (e.g., *Resolve* 1978), *intervenor* (e.g., Raiffa 1982) or *neutral* (e.g., Lawson 1985). Usually a third party is idealized as being independent (e.g., Jeffery 1984: 271), non-partisan (e.g., Susskind and Ozawa 1983: 256) or impartial (e.g., Raiffa 1982: 23). But it is important to recognize that there are situations in which this is not explicitly the case, and a third party is characterized as being political rather than apolitical (e.g., Carnevale 1986: 358).[4] Through the various forms of conciliation, facilitation, fact-finding and mediation, the continuum also reflects increasing efforts to manage the process through which information and feelings can be shared and accepted freely, creative brainstorming can be done in a non-threatening environment, and feedback can be given without accusation or judgement (Susskind and Ozawa 1983: 181). The mechanisms on the latter end of the continuum become increasingly appropriate as greater difficulty is encountered in finding a consensus.

- *Conciliators* attempt to assist negotiators in searching for accommodations, usually proceeding unilaterally, without necessarily having the agreement of all the parties involved (Haussmann 1986: 2); the term is sometimes associated with crisis situations (Lawson 1985).

- *Facilitators* at a minimum assist the negotiating parties in coming together, taking care of the logistics of meetings and possibly the implementation of their agreements, but stop short of getting involved in the actual negotiation (e.g., Raiffa 1982: 22; or *convenors*, Cormick 1985: 3).[5]

- *Fact-finders* usually have technical expertise relevant to the negotiation and use it to investigate and analyse the issues (e.g., Haussmann 1986). *Problem-solvers* explicitly go on to identify potential ways to resolve the issues, looking for possible joint gains and opportunities to avoid the necessity of compromise (e.g., Raiffa 1982).

- *Joint fact-finding* and *collaborative problem-solving* occur when the fact-finders and problem-solvers undertake the task directly with the negotiating parties (e.g., Susskind and Madigan 1984).

- *Mediators* often meet first separately, and then jointly with the interests involved, help each to understand the others' objectives, point out areas of agreement, and then encourage and assist them to settle their differences through compromise and negotiation (e.g., Talbot 1983: 1). In doing so, it is their function to develop doubt, erode expectations, reinforce reality, motivate momentum, keep the parties communicating, and create confidence in reaching a resolution (Greenbaum 1986). Thus mediators usually are at least as active as the preceding types of third parties, likely employ conciliation, facilitation and fact-finding, but may be considerably more active. "Passive mediation" (also called "traditional mediation" or "assisted negotiation") is only concerned with process issues, such as being fair and unbiased (Susskind and Madigan 1984: 182). It is distinguished from "active mediation" (or "negotiated mediation") in which there is not only concern with the process but also with the quality of the outcome, including results that are viewed as fair by the larger community, are reached efficiently, and endure.

- *Arbitrators* listen to arguments that can be made by disputing parties and then give their conclusions (e.g., Greenbaum 1986). Whereas all the preceding mechanisms are designed to assist the parties in reaching an agreement voluntarily, in arbitration some form of adjudication by a third party is involved. However, in contrast to the adversarial characteristics of judicial and quasi-judicial proceedings, adjudication by an arbitrator can be in the more constructive vein of mediation (Susskind and Madigan 1984: 181). Like mediation, arbitration may be imposed on the parties by an authoritative individual or organization, or the parties may agree to it voluntarily. In the case of "binding arbitration," the negotiating parties must submit to the judgement of the arbitrator, and in "non-binding arbitration" they may accept it or reject it (e.g., Susskind and Madigan 1984: 183).[6] In some instances after hearing the arguments, the arbitrator might attempt to mediate between the parties before imposing a decision (e.g., Raiffa 1982: 23). On other occasions, disputants may agree in advance to the use of a *superneutral* who will first attempt resolution through mediation and, when that fails, undertake arbitration (e.g., Greenbaum 1986).[7]

Modes of Decision Making and Potential Mechanisms

To analyse how the various negotiation mechanism have been and might be used in settling environmental disputes in Canada, it is necessary to relate them to the potential modes

4 Kressel and Pruit (1985: 189) make a similar distinction in separating "emergent" from "contractual mediators."

5 A more active facilitator suggested by Raiffa (1982: 23) would be a *rules-manipulator*, a third party that has the authority to alter or constrain the process of negotiation.

6 One variant on non-binding arbitration is Raiffa's (1985) idea of a *contract-embellisher*, a third party who would review agreements after the parties have reached them and make suggestions for improvements that they would be free to accept or reject.

7 Four more specific terms that are important in considering environmental disputes have emerged as a result of applying these mechanisms in particular situations. *Policy dialogues*, in which representatives of disputing parties have settled disputes about environmental policies, have been undertaken using facilitors and mediators (Murray 1978). *Regulatory negotiations* have been employed to explicitly utilize negotiation in establishing environmental regulations and to avoid disputes after the rules are established (McMahon 1985: 4). A *mini-trial* is in essence a staged court hearing presided over by a panel of key party representatives and a neutral advisor who, prior to the start of negotiations, render advisory opinions on legal matters affecting negotiations (Henry 1985). *Court-appointed masters*, used to assist judges in the United States with complex cases, may act as fact finders, problem solvers or mediators (Susskind 1985).

of decision making so that the context of their use is explicit. This is necessary because negotiation-based approaches can be used not only in negotiative but also in authoritative and consultative decision-making modes. To assist in differentiating these contexts, we will call them Type 1, Type 2, and Type 3, respectively. Type 1 refers to negotiations in a negotiative context, Type 2 refers to negotiation in an authoritative or intergovernmental context, and Type 3 refers to negotiation in a consultative context:

- Type I: negotiation is used to reach an agreements among parties, at least one of whom is private or non-governmental. For example, a forest company and an environmental protection agency negotiate an agreement on the size and location of log-booming grounds; a landfill operator, a government regulatory body, a municipal council, and citizen groups negotiate the terms for closing a landfill; a gas pipeline company negotiates with a fishing club on the construction methods to be used in crossing a stream; or a municipal council and a hydro-electric utility negotiate a compensation agreement for the siting of a nuclear energy plant.[8]

- Type 2: negotiation is used to reach an agreement among parties, all of whom are government departments or agencies. For example, two provincial governments negotiate the terms for managing an interprovincial river; or a province and the federal government negotiate offshore oil and gas management rights and revenue-sharing arrangements.

- Type 3: negotiation is used to reach a recommendation or produce a consultative document that the parties, who may be private or governmental, present to some government body. For example, government, industry, and interest group representatives from the mining and forestry sectors negotiate a joint response to proposed new environmental protection legislation.

The key distinction between an agreement and a recommendation is that, in the case of an agreement, the parties have some guarantee that any required government approval or sanctioning of the agreement will be given. The parties, therefore, are fairly certain that implementation of the agreement will occur. In contrast, in the case of a recommendation, the parties have no guarantee that their recommendations will be implemented by a government body; the government body only agrees to consider the parties' suggestions (Bingham 1986:7 uses a similar distinction).[9]

Negotiation in each of these contexts could include a decision to use conciliation, facilitation, fact-finding, mediation or arbitration. For example, negotiation between the forest company and environmental protection agency could be assisted by a mediator; negotiation between agencies concerned with the interprovincial river could be facilitated; and fact-finding could assist the mining and forestry interests in their negotiation.

We can also envisage negotiation taking place at the project, multiple use, policy, and rights levels. At the project level, municipal councils and interest groups might negotiate the siting of a new landfill. At the multiple use level, industry, environmental groups, and government could negotiate a management plan for an estuary. At the policy level, government, industry, and interest groups could negotiate amendments to pollution control legislation. And, at the rights level, the U.S. and Canadian governments might negotiate coordinated developments of an international river.

The scope of negotiations can vary at any of these levels. Negotiation might be used to settle comprehensive issues or to settle sub-components only. For example, project-level negotiation over a hydro-electric development might encompass siting, construction planning, impact prediction, impact monitoring and mitigation, compensation measures, etc. Alternatively, the negotiations might be restricted to establishing compensation and mitigation procedures only.

EXPERIENCE WITH NEGOTIATION-BASED APPROACHES IN CANADA

Negotiation has been extensively used in settling environmental disputes in Canada. There has, however, been relatively little analysis of this experience and what has been undertaken is fragmented among a variety of substantive topics (such as environmental mediation, international relations, planning, water resources management, etc.) and examined from diverse disciplinary-professional perspectives (e.g., lawyers, political scientists, economists, anthropologists, geographers, planners).

The use of negotiation in settling environmental disputes has been associated primarily with what is referred to as "environmental mediation." Most of the Canadian writings on environmental mediation are concentrated in four sets of material: Haussmann (1982); Shrybman (1983, 1984); *Canadian Environmental Mediation Newsletter* 1-4 (1986-87); and *Resolve* 18 (1986). To date, there has been almost no theory development by Canadians and almost all writers have drawn on the more extensive U.S. literature for theory and principles. Since the initial review by Haussmann (1982), only Shrybman (1984) has undertaken a comprehensive review of the U.S. literature and begun to relate it to the differences in the Canadian context. Sadler (1986) highlights the differences in political culture and institutional arrangements while providing a broad perspective on Canadian experience with environmental mediation in his introductory essay for a special issue of *Resolve* (18). Write-ups of the Canadian experience are generally brief, and largely descriptive; any analysis tends to be implicitly based on the principles in the U.S. literature. The one major exception to this is the five detailed case studies undertaken by Shrybman (1983).

8 For the purpose of the present analysis we have treated Crown corporations, such as the hydro-electric utility and native Indian bands, as private or non-governmental because in general their role in environmental disputes is more like these parties than like government. Similarly, elected town councils are treated as government, while citizen groups are considered to be non-governmental or private.

9 In practice, it is sometimes difficult to be sure whether to classify a negotiation as Type 1 (agreement) or Type 3 (recommendation) because at the time of negotiation the degree of commitment to implementation is unclear.

Our research into the use of environmental negotiation in Canada revealed 32 case studies, taken largely from the Canadian literature on environmental mediation and a few telephone interviews.[10] The cases we have identified constitute, we believe, most of what is still a relatively small body of analysis. In some instances, we believe we have been reasonably comprehensive in identifying where negotiation-based approaches were employed; in others we know that there is a great deal of experience and that we have only identified examples of it. The following summary describes the kinds of issues being negotiated, the parties involved, the levels of the disputes, the governance contexts, the negotiation mechanisms used, and the agreements reached.

The Cases Identified

An overview of cases where negotiation-based approaches for settling environmental disputes were explicitly used in Canada is provided in Table 1. The characteristics of each of these cases are summarized and compared in Appendix 1.[11] The

Table 1
An Overview of Canadian Negotiation Experience

	Subject	Location	Number of Cases Identified	
Project Level	Energy Developments	Alberta	4	
		Manitoba	1	
		Ontario	2	
		British Columbia	1	
	Landfill Siting and Effects	Ontario	5	
	Railway Developments	British Columbia / Alberta	2	
	Air Pollution	Ontario	1	
	Water Pollution	Ontario	1	
				17
Multiple Use Level	Water Resource Management	Ontario / Quebec	1	
		Manitoba / Ontario	1	
	Estuary Management	British Columbia	2	
				4
Policy Level	Sulphur Recovery Guidelines	Alberta	1	
	Toxic Chemicals Management	Canada	1	
	Bottle and Can Recycling	Ontario	1	
				3
Domestic Rights Level	Inter-provincial Water Resource Management	Western Canada	2	
	Offshore Oil and Gas Ownership, Pricing and Taxation	Atlantic Canada	2	
				4
International Rights Level	International Water Resources	Canada	1	
		Western Canada	2	
		Central Canada	1	
				4
		Total Number of Cases		32

10 For a complete description and analysis of these cases, see Dorcey and Riek (1987).

11 The sources of information for the analysis are listed after the appendix. Because of the limitations on information available and insufficient time to undertake new research, there are some gaps in the analysis. In addition, there may well be errors in our interpretations. There has not been time to circulate the analysis to knowledgeable participants for their review. We would greatly appreciate any assistance in correcting and refining the analysis.

cases show that negotiation-based approaches have been employed in settling environmental disputes:

- involving water and energy resource developments, and air, land, and water pollution;
- at all levels in the hierarchy of governance of natural resources; and
- in all the provinces of Canada.

The project- and policy-level cases are explicitly associated with the emerging Canadian experience and literature that is usually identified as "environmental mediation." On the other hand, the multiple use, domestic rights, and international rights level cases are not generally associated with explicit negotiation-based approaches to environmental dispute resolution. It is, however, clear from the illustrative examples in Table 1 that the Canadian experience with negotiation-based approaches to settlement of environmental disputes is much more extensive than has been generally recognized. Given the governance diversity of examples we have identified and the characteristics of the evolving systems of natural resource governance, we expect that a more comprehensive review would reveal many other cases at all five levels and concerning all kinds of environmental disputes.[12]

The Parties Involved

A wide variety of parties have been involved in negotiating settlements to environmental disputes; these include government departments and ministries, Crown corporations (acting as project proponents), industry, environmental and other interest groups, native Indian bands and tribal councils, and municipal councils. One-third of the cases we identified involved negotiation between government, industry, and interest groups (see Table 2). These are types of negotiation most commonly associated with the field of environmental mediation. However, our research indicates that there is a much broader range of environmental negotiation. Intergovernmental negotiation, negotiation between government proponents and private groups, and private negotiation also occur frequently.

Negotiation frequently involves or is associated with a regulatory body of some kind, particularly at the project level. For example, negotiation in Ontario has increasingly been initiated by the Ontario Environmental Assessment Board. In Alberta, negotiation-based approaches have been used by the Alberta Energy Resources Conservation Board. Examples have also been found involving the National Energy Board, the federal Environmental Assessment Review Process, and the

Table 2
The Parties in Negotiation

Intergovernmental		
	federal/provincial	9
	international	4
		13
Governmental/Private		
	government, industry, native Indians	4
	government, industry, local citizens	4
	government, industry, interest groups	3
	government, industry, local citizens, interest groups	1
		12
	government proponent, local citizens	4
	government proponent, native Indians	1
	government proponent, government, native Indians	1
		6
Private		
	industry, native Indians	1
		1
	Total number of cases	32

12 For an analysis of the evolving systems of natural resources governance, see Dorcey (1986).

International Joint Commission (the latter at the international rights level). Recently, the Manitoba Ministry of Environment has included a provision for the mediation of environmental disputes in its draft legislation for the new Clean Environment Act (1986).

The Decision-Making Environment

Four negotiation-based mechanisms were found to be used in the cases: unassisted negotiation, mediation, political mediation, and arbitration (see Table 3). It is notable that:

- unassisted negotiation accounted for more than half of all cases;
- all assisted negotiation involved some form of mediation;
- almost half of the mediated cases used political mediators;
- most negotiation experience has been at the project level;
- at the project level, negotiation was usually mediated but all four negotiation mechanisms were used to some extent;
- multiple-use negotiation was usually unassisted;
- policy-level negotiation was mediated;
- all of the domestic and international rights negotiations were unassisted.

Additional research into the use of environmental negotiation would likely reveal many more cases of unassisted negotiation and, perhaps, a greater use of political mediation than represented by our sample.

The cases also show that negotiation is being considered in all three types of governance contexts: negotiative, authoritative, and consultative (see Table 4). However, there are some significant differences in the context for negotiation at the various levels:

- at the project level, most negotiation was negotiative (Type 1); fewer were consultative (Type 3); and none were intergovernmental (Type 2);
- most multiple-use negotiation was intergovernmental;
- policy-level negotiation was largely consultative;
- all domestic and international rights negotiation was intergovernmental.

A more comprehensive analysis of Canadian cases would likely reveal negotiation in all three types of contexts — negotiative, consultative, and authoritative — at all levels (except perhaps the international rights level where private parties are unlikely to be involved).[13]

Table 3
Negotiation Mechanisms and Levels of Dispute

	Project	Multiple Use	Policy	Domestic Rights	International Rights
Unassisted negotiation	Darlington Atikokan Whitchurch Holbrook Rogers Pass Port Simpson	Lake of the Woods Ottawa River Fraser River Estuary		Canada-Nova Scotia Atlantic Accord Prairie Provinces Aggt. Mackenzie River	Boundary Waters Treaty Columbia River Treaty Great Lakes Water Quality Skagit Treaty
Mediation	Northern Flood White Dog Meaford Pauze Zalev Bros. Twin-Tracking Glackmeyer		Chemicals Mgmt. Pop Can Policy		
Political mediation	White Dog Syncrude I Syncrude II Canadian Superior Syncrude III	Cowichan River			
Political mediation arbitration			Sulphur Recovery		

13 At the domestic-rights level, negotiations involving aboriginal peoples would bring in private parties.

Table 4
The Governance Contexts and Levels of Disputes

	TYPE 1		TYPE 2	TYPE 3
Project Level	Pauze Zalev Bros. White Dog Whitchurch Darlington Holbrook Meaford	Cdn Superior Northern Flood Twin-Tracking Port Simpson Atikokan Glackmeyer Syncrude I		Syncrude II Syncrude III Rogers Pass
Multiple Use Level	Cowichan River Estuary		Lake of the Woods Aggt. Ottawa River Aggt. Fraser River Estuary	
Policy Level	Sulphur Recovery			Chemical Mgt Pop Can Policy
Domestic Rights Level			PPWA Mackenzie River Aggt. Nova Scotia Agreement Atlantic Accord	
International Rights Level			Boundary Waters Treaty Columbia River Treaty Great Lakes Water Quality Aggt. Skagit Treaty	

There are, however, several notable differences in the kinds of negotiation-based approaches used in the three types of contexts (see Table 5);

- all intergovernmental (authoritative or Type 2) negotiations were unassisted;
- in Type 1 and 3 contexts, some form of mediated negotiation predominated. Again, additional research should reveal many more examples of unassisted negotiation in Type 1 and Type 3 contexts, as well as examples of assisted negotiation in Type 2 (intergovernmental) situations.

In summary, two important conclusions can be drawn about the use of negotiation-based approaches. First, there is most experience at the project level involving a variety of mechanisms, particularly mediation. At other levels, there is less diversity of approach and a concentration on unassisted negotiation. Second, negotiation does occur in authoritative or consultative governance contexts. In the cases examined, unassisted negotiation predominates in Type 2 (authoritative or intergovernmental), and mediation in Type 1 (negotiative) and Type 3 (consultative). In a more comprehensive sample, unassisted negotiation would likely predominate in all contexts.

The Agreements

The negotiations in our sample produced a diversity of agreements. Of the 32 cases, 25 have produced an agreement to date. The remaining cases are either ongoing or have been unsuccessful. Table 6 classifies the agreements according to the nature of the provisions, whether procedural and/or substantive.

At the project level, the agreements are evenly distributed between those that deal only with substantive issues and those that deal with substance and establish procedural mechanisms of some form. Usually, the agreements provide for mitigation and compensation in exchange for withdrawal of community opposition. The kinds of project-level disputes that resulted in procedural and substantive agreements are frequently associated with *proposed* developments (such as energy or mining developments). These agreements frequently included mitigation measures and compensation payments, often established an arbitration mechanism to settle future claims, and, in one instance, allowed for community participation in mitigation and monitoring measures. In no instance did a negotiated agreement result in the abandonment of a proposed project. In contrast, project-level disputes about the environmental effects of *existing* developments (primarily landfills) are more closely associated with substantive agreements. These agreements have resulted in plans for gradual site-closure, rather than the more immediate closure being sought by community groups. Gradual closure plans both satisfied community concerns over negative environmental effects and gave site operators and municipal authorities flexibility to find a new site.

Table 5
Negotiation Mechanisms and Governance Contexts

	TYPE 1	TYPE 2		TYPE 3
Unassisted negotiation	Whitchurch Holbrook Port Simpson Darlington Atikokan	Lake of the Woods Ottawa River Prairie Provinces Aggt. Mackenzie River Atlantic Accord Canada-Nova Scotia	Boundary Waters Treaty Columbia River Treaty Great Lakes Water Quality Skagit Treaty Fraser River Estuary	Rogers Pass
Mediation	Northern Flood White Dog Meaford Pauze Zalev Bros. Twin-Tracking Glackmeyer			Chemicals Mgmt. Pop Can Policy
Political mediation	White Dog Canadian Superior Cowichan River Estuary Syncrude I			Syncrude II Syncrude III
Political mediational arbitration	Sulphur Recovery			

Table 6
Negotiated Agreements

	Procedural & Substantive	Substantive Only
Project Level	Darlington Atikokan White Dog Pauze Northern Flood Port Simpson	Whitchurch Holbrook Syncrude II Canadian Superior Rogers Pass Glackmeyer
Multiple Use Level	Lake of the Woods Ottawa River Fraser River Cowichan River	
Policy Level		Chemicals Management Pop Can Policy
Rights Level	Prairie Provinces Canada-Nova Scotia Atlantic Accord Boundary Waters Great Lakes	Columbia River Skagit Treaty

At the multiple use and rights level, agreements more often produced procedural and substantive agreements, rather than substantive agreements alone. Such agreements frequently established permanent or semi-permanent administrative bodies to deal with future disputes on an ongoing basis (e.g., the International Joint Commission, Fraser River Executive Committee, Lake of the Woods Control Board, Prairie Provinces Water Board, Ottawa River Control Board). Agreements that dealt only with substance were either the result of consultative negotiations (Pop Can Policy and Chemicals Management) or dealt with specific projects rather than broader resource management concerns (see Columbia River Treaty and Skagit Treaty cases). In one rights-level case, a negotiated settlement did result in the abandonment of a project proposal (see Skagit Treaty).

WHAT CONTRIBUTES TO NEGOTIATION SUCCESS?

To gain insight into the factors that contribute to the success of environmental negotiation in Canada, we have developed a series of questions from the literature on the principles and practice of negotiation. The questions address five sets of factors: (i) the kinds of disputes being negotiated (what can and cannot be negotiated), (ii) the parties involved (when is success more likely, how many parties should be involved), (iii) the decision-making environment (what is the relationship between negotiation mechanisms, governance contexts, and levels), (iv) the negotiation process (what procedural elements are important), and (v) implementation problems (what factors help or hinder implementation). This section briefly summarizes our major findings; these are discussed in detail in Dorcey and Riek (1987). The analysis is severely constrained by the limited information available and the conclusions must therefore be considered preliminary.

The Disputes Under Negotiation

The nature of disputes under negotiation are analysed by considering the following questions: In what resource sectors has there been negotiation experience? What kinds of issues have been negotiated (e.g., site selection, compensation, mitigation)? What kinds of disputes are not being explicitly negotiated? What is the nature of the conflict (well-developed or newly emerging)? How have disputes been selected for negotiation? How are negotiations at different points in time related?

Our analysis revealed several important observations:

- Although the cases identified at the project level dealt with a variety of resource sectors (landfills, mining and energy developments, water resource use and management), the kinds of issues being negotiated are similar: the mitigation of pollution problems of existing projects or the mitigation of community impacts of new projects.
- Negotiation has not been used as a replacement for existing project-approval processes; more typically, negotiations have been restricted to a narrow range of project-related issues.
- Negotiation has been used for a variety of conflicts, whether well-developed or emerging. Although the literature on negotiation/mediation stresses the importance of selecting polarized and mature disputes, pro-active negotiation may also be useful and appropriate in certain situations.

The Parties in Negotiation

There are three important issues concerning the parties in negotiation: What types of parties are involved in negotiations and does this affect the negotiation outcome? Can all parties be easily identified? Are party representatives easily identified?

Our analysis revealed the following:

- Negotiations occur between a variety of different parties. Because almost all negotiations were successful, we cannot judge whether the numbers or kinds of parties affect negotiation success.
- The parties to negotiation were easily identified at the project level, and representation issues did not seem problematic. At the policy level, however, the cases suggest that identification of the parties to negotiation is a difficult but not impossible task.
- Negotiation can be used to foster and strengthen an ongoing relationship between negotiating parties. By using negotiation in situations where the parties may have future interactions, adversarial parties can gradually develop an improved relationship and work together on a variety of issues. In essence, they are slowly learning how to negotiate!

The Decision-Making Environment

The types of questions we can consider in analysing the negotiation environment include: What negotiation mechanisms have been used? Does the level of disputes or the governance context affect the suitability of different mechanisms? How do negotiated agreements fit into existing administrative processes or board procedures? How are negotiations at different levels related? When are assisted negotiations more appropriate than unassisted negotiations?

Our analysis revealed the following insightful findings:

- Within the context of a regulatory process, the parties to a dispute may negotiate on their own initiative or their negotiations may be encouraged by a regulatory body, although we cannot make specific claims about the overall success of such government-initiated negotiations (only three of seven have reached agreement so far).
- Environmental review or assessment boards have successfully incorporated negotiated agreements into their existing administrative processes. When a negotiated agreement is reached over a matter normally subject to board approval, the board also has final approval of the validity of a negotiated agreement. The ways in which negotiated agreements can be incorporated into project-approval processes,

however, depend upon the mandates and functions of individual boards. Thus, regional negotiation styles arise.

- At both the project and policy levels, experimentation with negotiation appears profitable using political or apolitical mediation in a variety of contexts. The focus of environmental mediation literature on apolitical mediation perhaps belittles the possibilities in political mediation.
- Regulatory agencies have not experimented with ways in which they could foster unassisted negotiations between parties involved in specific disputes. Not much attention has been given to this in the literature on environmental negotiation or mediation, apart from suggestions aimed toward improving the general negotiating skills of individuals. There is not enough information in the cases identified, nor are there enough cases, to make it possible to determine if the encouragement of unassisted negotiation would be better or worse than the encouragement of mediation or some other form of assisted negotiation. However, it is generally assumed that parties relatively inexperienced with negotiation would benefit from some type of assisted negotiation.

The Negotiation Process

Several factors might affect the process of negotiation: Does a deadline affect negotiation success? How does the presence or threat of litigation or administrative processes affect negotiations? Are there sufficient incentives for the parties to negotiate? Can the parties reach agreement on procedural issues (i.e., the mechanics of negotiation)? How is negotiation funded? Do the parties negotiate in good faith? We begin to answer these questions below.

- Existing regulatory processes are useful catalysts for negotiation. Like the threat of court action, the threat of legislative or administrative procedures can give the parties incentive to negotiate.
- Success with negotiation-based approaches may lead to their funding by parties to a dispute rather than by government agencies. Where parties have previously had joint and successful experiences with negotiation, this may be more feasible than in cases where negotiation is being attempted for the first time.
- Government's responsibility for maintaining some balance of power between negotiating parties, especially with regard to financial resources, is not clear. Efforts could be made to develop possible funding methods for apolitical mediation that provides support for parties yet which also maintains the neutrality of the negotiations.
- There is some evidence to suggest that the lack of clear deadlines might unnecessarily prolong negotiation or inhibit settlement. This implies that government-initiated negotiations should consider carefully the structural factors, such as deadlines, that contribute to negotiation success.

Implementation

We can assess the success of negotiations by considering what, if any, implementation problems arose once an agreement was reached. There are several questions that should be addressed: How frequently do implementation problems arise?

What are the sources of implementation problems? For example, was the wording of agreements clear and unambiguous? Did arbitration procedures for claims work smoothly and as planned? Did the agreements last, or did parties attempt to withdraw from the agreements or renegotiate certain issues? Did groups not party to an agreement voice complaints about it?

Generally, our findings indicate considerable success and few implementation problems with negotiated agreements.

- Very few negotiated agreements have resulted in implementation problems. Of 25 cases in which negotiations have concluded and resulted in an agreement, only five have been identified as having implementation problems.
- The few implementation problems that did arise included imprecise wording of agreements, slow arbitration processes, attempts by parties to renegotiate agreed-upon issues, withdrawal of a party from the agreement, and complaints by parties excluded from negotiations but nevertheless affected by the agreement.
- Our findings should be interpreted with caution because few written case studies have dealt explicitly with implementation of agreements. Instead, the focus has more often been on the events leading up to and during negotiation. There is clearly a need to gather more information on the implementation of negotiated agreements.

TOWARD AN AGENDA FOR DEVELOPMENT AND RESEARCH

Given the extensive use and apparent great potential of negotiation in settling environmental disputes in Canada, it is remarkable how little research has been undertaken to evaluate its productivity and guide its development. It is extremely difficult to be analytical about the experience to date because of the limited number of case studies that have been written up, the diverse and partial frameworks that have been applied in those that have been studied, and the lack of analytical framework appropriate to the systems of natural resources governance in Canada. We therefore suggest how we should proceed to develop better and quicker understanding of Canadian and U.S. experience through an integrated program of development and research.

How Can We Learn More From Canadian Experience?

Our analysis has indicated several areas where further research might prove beneficial. A comprehensive search for additional examples of environmental negotiation would help test and refine our preliminary findings. More detailed information on negotiation procedures used (i.e., the mechanics) and on implementation problems could provide practitioners with valuable guidelines for future experimentation.

Of more immediate importance than research is the need for continued experimentation with negotiation-based approaches. The following recommendations are put forward:

- Focus on experimentation at the project level, where there are existing administrative mechanisms within which negotiation can be used.
- Use negotiation as a complement to project review processes, not as a substitute.
- Identify opportunities for negotiation in sub-components of the total project review process, e.g., in scoping, in establishing monitoring and mitigation plans, in determining compensation levels, etc.
- Use negotiation either pro-actively or after a conflict has been well established.
- Consider the use of negotiation in a consultative context to produce a recommendation, as well as in a negotiative context to produce an agreement.
- Choose disputes that have a reasonable chance of resolution by negotiation, i.e., avoid disputes that are difficult to resolve, such as those involving fundamental differences of principle or where the parties have little reason to seek an agreement.[14]
- Use negotiation when the parties can be clearly identified, e.g., at the project level where impacts are localized.
- Experiment with negotiation in situations in which the parties are likely to have future relations; this allows parties to learn negotiating skills and helps to promote wider acceptance of negotiation.
- First convene the parties and then suggest the use of negotiation, e.g., convening could be done by government staff trained to do so during screening, mitigation, compensation, monitoring, etc.
- Pay close attention to representational problems, especially if using negotiation proactively where parties may not have had time to form cohesive groups.
- Offer training in how to negotiate, e.g., once parties show interest in using negotiation, the convenor could offer to hold a one-day workshop to help participants understand what would be involved.
- Suggest the use of some third-party intervention rather than unassisted negotiation.
- Try minimal third-party intervention first, i.e., consider conciliation, facilitation, fact-finding, mediation, and arbitration sequentially and only use each one as the dispute requires.
- Try apolitical and political mediation; both may be appropriate but political mediation is more likely appropriate in a consultative context, and apolitical mediation required in some judicial and quasi-judicial processes.
- Set credible deadlines for negotiation after which regular administrative procedures would come into force.
- Encourage the parties to pay for the costs of mediation after they have had some experience and success with negotiation; government agencies should be prepared to support parties' initial attempts at mediated settlements.
- Establish resource pools that the parties may draw on as required to provide assistance and funding for technical or other requirements during the negotiation process.
- Create explicit arrangements for implementation of the results of the negotiation, e.g., this might include establishment of an organization that carries out implementation through a process of negotiation or provisions for renegotiation as necessary.

How Can We Learn More From the U.S. Experience?

The literature on the principles and practice of negotiation is dominated by major contributions from the United States, where the use of environmental mediation has been more extensive than in Canada. An explosive growth in the literature has occurred during the last decade (e.g., Bingham 1986; Cormick 1985; *Resolve* 1978; Rivkin 1977; Susskind and Madigan 1984; Talbot 1983). Canada can learn an immense amount from the U.S. experience and literature.

Indeed, Bingham's (1986) analysis of over 100 examples of environmental mediation in the United States contains many similarities to our findings. For example, Bingham (pp. xvii-xxv) found that mediation occurred over a variety of issues at both the project and policy level; policy-level agreements, however, proved more difficult to implement. Mediation involved a wide array of parties and occurred most frequently between governments, or between government and local citizens. Mediation in the United States has also been used to produce agreements and recommendations, as well as to improve communication between parties. Bingham found several factors that contribute to the likelihood of success in mediation: (i) the use of dispute assessment or screening by a professional mediator to help the parties decide if they should enter into negotiation or mediation; (ii) the willingness of the parties to negotiate; and (iii) the participation by those with authority to implement decisions. Perhaps more significantly, Bingham found that negotiation success was not affected by the number of parties, the types of issues, or the presence of a deadline (although a sense of urgency was important).

Several important differences between the governance systems in Canada and the United States could affect the use of negotiation. These differences relate to the role of the courts, legislatures, government executives, government bureaucracies, and private interests.

14 The U.S. literature has given a great deal of attention to the questions that should be asked in determining at an early stage whether a dispute is amenable to resolution through some form of assisted negotiation; see for example, Cormick (1985) and Shrybman's (1984) application to Canada.

- Property rights and due process are not enshrined in the constitution in Canada.
- The constitutional division of responsibilities for natural resources in the Canadian federal system gives the provinces a much larger role than states have.[15]
- Federal and provincial government executives (i.e., cabinets) in Canada have much greater freedom to act; they are not so constrained by the courts and legislatures as in the United States.[16]
- The discretionary nature of Canadian legislation and the weak development of administrative compliance legislation have resulted in much less use of the courts in Canada.
- The courts in the United States have historically taken an interventionist role; this situation is slowly evolving in Canada under the influence of the new Charter of Rights and Freedoms.
- There is a greater tradition of self-governance and litigation in the United States, in contrast with the tradition in Canada that the government has always been there and that the Crown can do no wrong nor be sued.

There has not yet, however, been much consideration of how these differences have influenced the ways in which environmental disputes arise and the ways used to settle them. Based on the U.S. literature and the Canadian cases, we can suggest several possible implications. For example, the more even distribution and overlap of constitutional powers in Canada has led to more bargaining and negotiation between the federal and provincial governments. The much smaller size of bureaucracies in Canada, combined with the practice of writing highly discretionary legislation and the weak development of administrative compliance legislation, has likely made bargaining and negotiation more feasible.

In Canada, there is also less use of bargaining and negotiation that is stimulated by a desire to avoid the courts, particularly in the area of federal rulemaking. As much as 80% of U.S. Environmental Protection Agency (EPA) rules and regulations are challenged in court (*Resolve* 1986: 8). This has led the EPA to develop the Regulatory Negotiation Project to experiment with negotiated rulemaking. This, in turn, has spawned a series of theoretical articles (McMahon 1985; Susskind and McMahon 1985; McGlennon and Susskind 1987). Differences in governance systems, therefore, affect not only the types of negotiation experience but also the development and emphasis of the literature. Such differences should be carefully considered when applying the results of U.S. experience to Canadian situations, and analysis of them should be a research priority.

How Productive Are Negotiations and Bargaining?

Given that bargaining and negotiation are pervasive in the governance of natural resources in Canada, it is essential to consider how well the existing processes operate. Before considering how the settlement of environmental disputes could be improved by more and better explicit negotiation, based on the results of previous studies, the following conclusions about the evolving systems of governance can be suggested and should be refined and tested in more comprehensive analyses:[17]

- Bargaining and negotiation are in principle consistent with the *ideals of democratic governance* to which Canadians aspire.
- Bargaining and negotiation are processes that are highly suitable for dealing with conflicts arising from *increasing demands, complexity, and uncertainty* in the governance of natural resources.
- The evolving processes of governance have greatly increased the opportunities for *participation of interests*, particularly those in agencies of government, in decision making on natural resources.
- While there has been an enormous increase in the data and knowledge available to be used in governance, the *information* developed frequently falls short of what could be generated.
- The productivity of bargaining and negotiation is not only frustrated by poorly informed participants but also by a lack of *leadership and accountability* in the hierarchies of governance.
- Weaknesses in the *interaction skills* of participants in the governance processes have seriously undermined the potential of bargaining and negotiation.
- The *structure* of some governance processes has accentuated environmental disputes.

How Can We Improve the Productivity of Bargaining and Negotiation?

Research and development should address two issues: developing interaction skills and structuring the processes of governance.

Improving the interaction skills of participants is of fundamental importance. Poor communication skills, negative and adversarial behaviour, and a lack of negotiation skills predominate and cause serious problems in settling environmental disputes throughout the Canadian governance system. Without these skills, it is extremely difficult to deal appropriately and effectively with the cognitive, value, interest, and behavioral

15 In the exceptional case of the territories, the federal government still retains a dominant role.

16 Minority governments can produce important exceptions to this rule.

17 These studies are reported in Dorcey (1986), which focuses on the governance of Pacific coastal resources but does reference studies of other resource governance systems in Canada. Although it is not usually the main topic, a variety of disciplines/professions that have been analysing the governance of Canadian resources include consideration of the role of negotiation. Several recent papers and conferences suggest that a ready basis exists for outlining the role of negotiation in competing analytical models of natural resources governance (e.g., Sproule-Jones (1982), Saunders (1986), Pinkerton and Berkes (forthcoming), and McCay and Acheson (forthcoming)).

elements of conflict. At the same time, the relatively few individuals who have these skills clearly demonstrate their impact on the performance of the governance processes in which they are involved. A broad strategy of integrated research and development is required to accelerate innovations that are already underway.

This strategy should address the following questions:

- How can basic interaction skills be better developed as part of the post-secondary education programs undertaken by students pursuing careers in the field of natural resources?
- How can basic interaction skills be better developed in the organizational development programs of government agencies and companies concerned with natural resources?
- How can a cadre of people with specialized skills in assisting negotiations be more quickly developed?

Structuring the processes of governance to better facilitate and exploit negotiation is crucial. The development of referrals, guidelines, task force and planning processes, together with the use of interagency committees and special purpose organizations, have helped to facilitate negotiations. Major deficiencies in the performance of these processes derive in large part from weaknesses in participants' interaction skills; there are, however, often some structural weaknesses, particularly in the earlier stages of process development. Impact assessment processes have often been developed in ways that frustrate productive bargaining and negotiation. The quasi-judicial processes that are generally used in reviewing impact assessments encourage negative and adversarial behaviour of participants and tend to emphasize destroying each side's credibility rather than seeking understanding of the reasons for disagreements and opportunities for agreement. There is a need to experiment with different ways of structuring the processes for bargaining and negotiation in the governance of natural resources.

The following suggestion for impact assessment processes illustrates in a general way the type of experiments that should be conducted using the guidelines we have proposed:

- Mandate the panel to review agreements reached with regard to project impacts, mitigation, and compensation, and to recommend action on residual disagreements.
- The panel, through its staff, would be responsible for organizing and setting a schedule for negotiations between representatives of interested parties.
- The staff would assist the negotiations by facilitation and mediation where necessary.
- The staff would thus assist in identifying stakeholders and representatives, determining procedures and agendas, defining issues, searching for potential agreements, etc.[18]
- In particular, the staff would assist in fact-finding and problem-solving, bringing the stakeholders together with people having appropriate knowledge.[19]
- Written agreements and documentation of residual disagreements produced through this process would then be made public and submitted to the panel for review and adjudication. The panel could hold a public hearing if it is deemed necessary.

SUMMARY AND CONCLUSION

This paper outlines a suggested framework for analysing negotiation-based approaches to the settlement of environmental disputes in Canada. It indicates that Canadian experience with negotiation has, by and large, been successful. We have argued that negotiation-based approaches are much more widely used in the governance of natural resources in Canada than is generally recognized. This not only reflects the widespread practice of bargaining but also the increasing use of explicit negotiation. It is in this context, where negotiation is often unassisted by third parties and undertaken sporadically, that opportunities for more and better use of negotiation-based approaches to resolving environmental disputes, including greater use of third parties and government support of negotiation, should be considered. Negotiation appears to be an extremely useful device for resolving certain types of environmental disputes within many existing government administrative processes.

Before further progress can be made in evaluating experience with negotiation, it is essential to develop analytical frameworks appropriate to the principles and practice of governance in Canada. Without such frameworks, we cannot capitalize on the U.S. experience and we are constrained in assessing Canadian experience.

There are, however, significant limits on how much can be learnt from retroactive studies of negotiation and so it is essential to rapidly focus on opportunities for experimental development. We have suggested guidelines for a broad strategy designed to develop the interaction skills of participants and experiment with changes in the structure of governance processes, such as impact assessment.

It is important to expect that, as more explicit attempts are made to improve and expand the use of negotiation-based approaches to settlement of environmental disputes, deeply entrenched attitudes, perceptions and interests will be challenged. Once this is recognized, it is easier to understand why there is so little explicit consideration of the practice of bargaining and negotiation. To change these reactions, it will be necessary to demonstrate more clearly that explicit use of

18 For more detailed suggestions on the functions of the panel staff, see the suggestions of Susskind and Madigan (1984: 188) and Cormick and Knaster (1986: 6).

19 Innovative ways of dealing with scientific controversy in such assisted negotiations have been evaluated by Ozawa and Susskind (1985) and Cormick and Knaster (1986).

negotiation-based approaches can be more effective than the approaches we now use in dealing with concerns about fairness, informed choice, accountability, and the cost of governance. We believe the case can be made; it is time to start making it.

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APPENDIX 1

CASE STUDIES OF NEGOTIATION IN CANADA

Table 1: Project Negotiation in Ontario I
Table 2: Project Negotiation in Ontario II
Table 3: Project Negotiation in Alberta and the Energy Resources Conservation Board (ERCB)
Table 4: Project Negotiation in Manitoba, in British Columbia, and the Federal Government
Table 5: Multiple-Use Negotiation
Table 6: Policy-Level Negotiation
Table 7: Domestic Rights Level Negotiation — Water Resources
Table 8: Domestic Rights Level Negotiation — Offshore Oil and Gas Resources
Table 9: International Rights Level Negotiation

Table 1
Project Negotiation In Ontario I

Characteristic	Darlington	Atikokan
dispute	community impacts of nuclear plant	community impacts of coal-fired thermal plant
third-party intervention	unassisted negotiation	unassisted negotiation
third party	not used	not used
year dispute began	1971	1970s
year negotiations began	1977	1970s
duration of negotiations	4-5 months	unknown
parties	Newcastle township, Ontario Hydro	Atikokan township, Ontario Hydro
initiator of negotiations	Ontario Hydro	Ontario Hydro
event inducing negotiation	potential hearing under Environmental Assessment Act	potential hearing under Environmental Assessment Act
past resolution attempts	Hydro liaison committee	none
nature of agreement reached	compensation fund with arbitration of claims	arbitration of compensation payments; monitoring
implementation problems	not apparent	not apparent
agreement subject to review	by EAB	by EAB
Type of Negotiation	Type 1	Type 1

DIAND — Department of Indian Affairs and Northern Development

EAB — Environmental Assessment Board

White Dog	Whitchurch	Holbrook
community health effects of mercury pollution	toxic wastes dumped in landfill	toxic wastes dumped in landfill
i) mediation ii) unassisted negotiation	unassisted negotiation	unassisted negotiation
i) Edward Jolisse ii) not used	not used	not used
early 1970s	mid 1960s	late 1970s
i) 1978 ii) 1985	1982	1982
i) 2.5 yrs; ii) 6 months native Indian bands, federal and provincial government, industry	several weeks industry, provincial government, community	several weeks industry, citizen group, county township, provincial government
i) DIAND ii) Indian bands	York Sanitation	township and citizen groups
legal action brought by native Indians	legal action by government nominal fines; EAB hearing ordered for 1982	threatened legal action by community groups; EAB hearing ordered for Nov. 1982
previous negotiation attempts	inquiry, EAB hearing, ombudsman	town council meetings?
compensation fund with arbitration of claims	plan for gradual closure	plan for gradual closure
not apparent	not apparent	not apparent
ratifying legislation	by EAB	by EAB
Type 1	Type 1	Type 1

Table 2
Project Negotiation In Ontario II

Characteristic	Meaford	Pauze	Zalev Bros.	Glackmeyer
dispute	landfill siting	toxic wastes dumped in landfill	iron-oxide emissions from metal processing plant	sewage lagoon expansion
third-party intervention	mediation	mediation	mediation	mediation
third party	Ruth Burkholder Grey-Bruce Tourist Assn.	Michel Picher Adjudication Services Ltd.	Neil Gold Dean of Law, U of Windsor	Michel Picher Adjudication Services Ltd.
year dispute began	1982	1982	1977	mid 1980s
year negotiations began	1982	1984	1985	1985
duration of negotiations	underway for 4 years	4-5 months	underway for 2 years	1 day
parties	community, proponent (municipality)	industry, municipality provincial government, citizens' groups	industry, citizen group, union municipality, provincial government	local residents, town of Glackmeyer
initiator of negotiations	Minister of Environment	Chairman of EAB	Minister of Environment	lawyer for residents
event inducing negotiation	EAB hearings	legal action; closure of site threatened by Ministry	threatened legal action	threatened legal action
past resolution attempts	public consultation	mitigation efforts	site evaluation	none
nature of agreement reached	negotiation in process	plan for closure; mitigation; ratepayer representation on waste authority	negotiation in process	buffer zone, resident access to sewage system
implementation problems	negotiation in process	not apparent	negotiation in process	party withdrew; court suggested negotiation
agreement subject to review	by EAB	by EAB	by EAB	none
Type of Negotiation	Type 1	Type 1	Type 1	Type 1

EAB — Environmental Assessment Board

Table 3
Project Negotiation in Alberta and the Energy Resources Conservation Board (ERCB)

Characteristic	Syncrude I	Syncrude II	CDN Superior	Syncrude III
dispute	community impacts of existing oil sands mining	community impacts of new oil sands mining	emergency response plan for sour gas site	major expansion of oil sands mining
third-party intervention	political mediation	political mediation/ arbitration	political mediation	political mediation/ arbitration
third party	ERCB member	Ralph Evans, ERCB	unknown	Ralph Evans, ERCB
year dispute began	1984	1985	unknown	1986
year negotiations began	1985	1985	unknown	1986
duration of negotiations	underway for 2 years	5 months	unknown	underway for 1 year
parties	government departments, industry, ERCB, native Indian band	government departments, industry, ERCB, native Indian band	industry, town of Hinton, local health officers	government departments, industry, ERCB, native Indian band
initiator of negotiations	ERCB	ECRB	ERCB	ERCB
event inducing negotiation	unsatisfactory hearing	mining applications	ERCB initiative	mining application
past resolution attempts	ECRB hearing	none	none	none
nature of agreement reached	negotiation in process	in agreed application; mitigation; monitoring community participation	evacuation plan	negotiation in process
implementation problems	negotiation in process	not yet	not yet	negotiation in process
agreement subject to review	no	by ERCB	by ERCB	by ERCB
Type of Negotiation	Type 1	Type 3	Type 1	Type 3

Table 4
Project Negotiation in Manitoba, British Columbia, and in the Federal Government

Characteristic	Northern Flood	Port Simpson	Rogers Pass	Twin-Tracking
dispute	community impact of hydro-electric project	siting LNG terminal near native Indian reserve	constuction effects in park areas	construction effects on native Indian fishing rights
third party intervention	mediation	unassisted negotiation	unassisted negotiation	mediation
third-party	Leon Mitchell, Q.C.	not used	not used	Andy Thompson, professor and lawyer, UBC
year dispute began	1970	early 1980s	1980s	early 1980s
year negotiations began	1975	early 1980s	1982	1985
duration of negotiations	3 years	unknown	several months	6 months
parties	native Indians, Manitoba Hydro, DIAND	native Indians, Dome Petroleum	federal government CP Rail and Parks Canada	native Indians, CN Rail
initiator of negotiations	native Indians	Dome Petroleum	unknown	Minister of Transport
event inducing negotiation	threatened legal action by native Indians and federal government	upcoming NEB hearing	EARP hearings	legal action by native Indians; political pressure
past resolution attempts	public inquiries	unknown	CTC review, hearings	EARP hearings
nature of agreement reached	mitigation; compensation fund with arbitration of claims	compensation fishery protection employment from Dome; easements from Band; claims resettled by joint committee or arbitration	scoping of issues for EARP hearing process	no agreement reached; parties resort to courts
implementation problems	imprecise wording; slow process renegotiation; parties excluded	LNG project abandoned	issues re-emerged as community concerns were raised	no agreement reached
agreement subject to review	no	no	by EARP panel	not applicable
Type of Negotiation	Type 1	Type 1	Type 3	Type 1

CTC — Canadian Transport Commission

DIAND — Department of Indian Affairs and Northern Development

NEB — National Energy Board

Table 5
Multiple-Use Negotiations

Characteristic	Lake of the Woods	Ottawa River	Fraser River, B.C.	Cowichan River, B.C.
dispute	regulate water flows for hydro, flood control, navigation	manipulate hydro storage to reduce flooding	development of estuary management program	implementation of estuary management plan
third-party intervention	unassisted negotiation	unassisted negotiation	unassisted negotiation	political mediation
third party	not used	not used	not used	G.K. Lambertsen, Ministry of the Environment
year dispute began	early 1900s	1974	late 1970s	early 1970s
year negotiations began	1917	mid 1970s	1977	1981
year agreement reached	1928	1983	1985	1984
parties	Ontario, Manitoba, Canada	Ontario, Quebec, Canada	B.C. Ministry of Environment, Environment Canada	Ministry of Environment, federal Department of Fisheries, industry, landowners
initiator of negotiations	IJC recommendation	unknown	both parties	Ministry of Environment
event inducing negotiation	IJC levels set; federal legislation enacted	flooding in Montreal area in 1974 and 1976	increasing use and conflict in the Fraser River estuary	potential use of estuary as major industrial port
past resolution attempts	Board set up in 1919 but Ontario withdrew legislation	guidelines and committees	Fraser River Estuary Study	two Task Force reviews
nature of agreements reach	regulation of water flows with limits set by IJC; do not regulate water quality	committee to regulate storage capacity to reduce flood damage without reducing hydro capacity; referral of disputes to Cabinet ministers	specification of broad goals for information systems, water quality plans, activity plans, and area plans negotiated by executive committee	environmental management plan for estuary including subagreements between parties
implementation problems	not apparent	not apparent	slow, piecemeal implementation	not apparent
agreements subject to review	no	no	no	no
Type of Negotiation	Type 2	Type 2	Type 2	Type 1

IJC — International Joint Commission

Table 6
Policy-Level Negotiation

Characteristic	Sulphur Recovery	Chemicals Management	Pop Can Policy
dispute	revising sulphur recovery guidelines in Alberta	drafting chemicals management proposal for federal government	drafting new regulations for for soft-drink containers
third party intervention	political mediation/arbitration	mediation	mediation
third-party	ERCB member	The Niagara Institute	Paul Emond, professor, Osgood Hall Law School
year dispute began	early 1980s	1970s	mid-1970s
year negotiations began	1986	1984	1985
duration of negotiations	underway for 1 year	1 year	5 weeks
parties	Alberta Environment, ERCB, industry, three public representatives	gov't, industry, interest groups, public scientists, academics, consultants	industry, interest groups, government
initiator of negotiations	ERCB	Environment Canada	Ontario Environment
event inducing negotiation	none	none	none
past resolution attempts	past revisions did not include public participation	none	none
nature of agreement reached	negotiation in process	consultation document, not binding on any of the parties	proposed legislations
implementation problems	negotiation in process	nothing to implement	none
agreement subject to review	by Alberta Environment and ERCB	not applicable	by Ontario legislature
Type of Negotiation	Type 1	Type 3	Type 3

ERCB — Energy Resources Conservation Board

Table 7
Domestic Rights Level Negotiation — Water Resources

Characteristic	Prairie Provinces	Mackenzie River
dispute	regulate inter-provincial water supply and management	regulate inter-provincial water supply
third-party intervention	unassisted negotiation	unassisted negotiation
third-party	not used	not used
year dispute began	1967	late 1960s
year negotiations began	unknown	unknown
year agreement reached	1969	negotiations in process
parties	Alberta, Manitoba, Saskatchewan, Canada	British Columbia, Alberta, Saskatchewan, North West Territories, Canada
initiator of negotiations	unknown	unknown
event inducing negotiation	large water development proposal by Alberta in 1967	construction of Bennett Dam in British Columbia in late 1960s
past resolution attempts	unknown	unknown
nature of agreement reached	formula for allocating water supply between three provinces; provisions to address water quality in the future; referral of disputes to Federal Court	negotiation in process
implementation problems	not apparent	negotiation in process
agreement subject to review	no	no
Type of Negotiation	Type 2	Type 2

Table 8
Domestic Rights Level Negotiation — Offshore Oil and Gas Resources

Characteristic	Canada-Nova Scotia	Atlantic Accord
dispute	offshore oil and gas resource managment and ownership rights	offshore oil and gas resource management and ownership rights
third party intervention	unassisted negotiation	unassisted negotiation
third-party	not used	not used
year dispute began	1980	1980
year negotiations began	early 1980s	early 1980s
duration of negotiations	2 years	5 years
parties	Nova Scotia, Canada	Newfoundland, Canada
initiator of negotiations	Nova Scotia	Newfoundland
event inducing negotiation	introduction of federal NEP	introduction of federal NEP
past resolution attempts	negotiations prior to NEP	negotiations prior to NEP
nature of agreement reached	revenue-sharing agreement; ownership would not prejudice; cap on provincial revenues	revenue-sharing agreement; no cap on provincial revenues; ownership settled in court
implementation problems	unknown	unknown
agreement subject to review	no	no
Type of Negotiation	Type 2	Type 2

NEP — National Energy Policy

Table 9
International Rights Level Negotiation

Characteristic	Boundary Water	Columbia River	Great Lakes	Skagit Treaty
dispute	Canada-U.S. water management	managing variable flow of river in U.S. and Canada	water pollution in Lakes Erie and Ontario	construction of the High Ross Dam
third-party intervention	unassisted?	unassisted	unassisted	unassisted
third party	not used	not used	not used	not used
year dispute began	1890s	1930s and 1940s	1960s	1974
year negotiations began	early 1900s	1944	late 1960s	late 1970s
duration of negotiations	agreement reached 1909	agreement reached 1964	agreement reached 1972, 1978	agreement reached 1984
parties	U.S., Great Britain (Canada)	U.S., Canada, British Columbia	U.S., Canada	U.S., Canada
initiator of negotiations	uncertain	uncertain	uncertain	IJC
event inducing negotiation	small, localized problems	flooding, hydro projects	pollution problems	potential flooding
past resolution attempts	piecemeal	IJC studies	IJC studies	1967 agreement
nature of agreement reached	establishment of IJC	dams, storage, power generation, energy sales	unknown	High Ross dam cancelled, compensation from British Columbia
implementation problems	not apparent	not apparent	unknown	unknown
agreement subject to review	no	no	no	no
Type of Negotiation	Type 2	Type 2	Type 2	Type 2

IJC — International Joint Commission

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COMMENTARY I

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The presentation by Dorcey and Riek provides an analysis of the use of negotiation for the purpose of resolving environmental issues. It does this by reviewing a number of environmental assessment studies carried out in Canada within which negotiation played a clearly recognized role. However, Dorcey and Rick fail to recognize how broadly explicit negotiation has been used as a regular part of the federal Environmental Assessment and Review Process (EARP) for a number of years. Perhaps from the point of view of those outside the federal agencies directly involved with the application of EARP the intensive use of negotiation in environmental screening, in responding to EARP panel reports, in preparing government responses, and in involvement with the municipalities and proponents is not evident. Neither might one be aware that negotiation plays a very important role in what is included in initial environmental evaluations and environmental impact statements. In all of these cases, negotiation plays the fundamental role of fitting "an ideal" into "a reality."

Dorcey and Riek state that environmental disputes arise as both substantive and procedural issues. I would add a third class which now, in many cases, is the most important. This encompasses issues where perception and reality are substantially different. While cognitive conflicts are recognized, their role in impeding communication has not been sufficiently highlighted. In my experience, resolution of perceptual issues must be sought before useful negotiation can really proceed.

In reviewing the three modes of decision making described by Dorcey and Riek, I had some difficulty in understanding the distinction between Types 1 and 3. A clarification of these would help. Given that this distinction is not clear, I focused my attention on Types 1 and 2.

In reviewing the experience section, I found that assigning a complete project to only one type of decision making was quite artificial. Any major EARP hearing is the result of a host of negotiations of both types of decision making. Sometimes these different types occur simultaneously, sometimes concurrently. In interpreting any results from the classification, one must remember that only one particular facet is being typed, and that facet may not be the dominant or key one. A good example of the problems that can arise in classifying a case is given by the West Coast environmental hearing on offshore oil and gas exploration. In this case, negotiations occurred between industry and the public, between industry and governments, between the federal government and the provincial government, between the provincial government and the public, and between the federal government and the public. All these negotiations played a part in arriving only at the terms of reference for the panel hearing! Which type of decision making dominates?

While much is covered by Dorcey and Riek, there are several aspects of negotiation that I believe need to be given more attention. The first relates to the negotiators themselves. In a negotiation, it is very hard for a negotiator to remain part of his or her initial group, or to represent its interest all of the time. A negotiator, of necessity, must compromise from time to time and can be said, in a sense, to be co-opted by the process. It is not unusual for the negotiator to want a successful conclusion to the effort. This leads to the real possibility that the representative serving as the negotiator may lose that "representative" status during the course of the negotiation. Special attention must be given to this problem if negotiation is to remain a viable process.

Another point that needs to be given more attention is that a negotiation will only proceed when the parties want it to. What must the practitioner do to arrive at this state when, at the start, one side may have no wish to negotiate and may feel its position would be weakened if it agreed? Once agreement has been reached, the next hurdle to be addressed is how to get both parties to agree on the objective and the framework of the negotiation before starting. If this is not done, false expectations can exist, which may result in a negotiation ending in a lose-lose situation.

A final aspect relates to the match of negotiating skills and how best to achieve a balance. If negotiators are not matched, the results can be one sided: therefore, attention must be given to the selection of skilled individuals or to improving the negotiations skills of those involved.

The theme paper presents very valid arguments about why the Environmental Assessment and Review Process has permitted, even encouraged, negotiation. In fact, as the authors emphasize, the flexibility inherent in EARP has provided the freedom to experiment and develop innovative approaches to resolving environmental conflicts. The reference to the problems inherent in judicial processes and, in particular, their encouragement of negative and adversarial behaviour, is excellent.

In conclusion, I certainly agree with the general recommendation that we need to maintain flexibility within EARP and encourage more explicit use of negotiation rather than relying entirely on the panel process to meet the end objective of integrating environmental concerns into project planning. Care, however, must be exercised in institutionalizing negotiation. The institutionalization of existing informal processes may actually impede conflict resolution. Proposed changes to EIA, such as the current emphasis on legislating the federal process, may have similar effects. The process should not become the product.

COMMENTARY II

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Dorcey and Riek provide a good illustration of the Canadian experience in the use of negotiative processes to settle environmental disputes.

My comments are structured around six foci: 1) the U.S. experience and how it relates to the Canadian situation; 2) the nature and inter-relationship of conflict, power, and negotiation; 3) negotiation and the environmental impact assessment (EIA) process; 4) key elements in the development of dispute settlement processes; 5) definitions of "success" in the application of negotiative procedures; and 6) the need for and ways of improving negotiating skills. Some key issues are raised under each of these topics.

CANADA VS. THE UNITED STATES

There are a variety of important differences between Canada and the United States and these have a bearing on the use of negotiation processes in environmental and public-policy conflicts. There are, however, also a number of myths. I will begin with the latter.

Myth 1: Canada has a great deal to learn from the U.S. experience in "environmental mediation."

Dorcey and Riek have identified a significant number of situations where negotiation-like processes have been used in Canada. A recent comprehensive research effort in the United States found that only about 125 environmental disputes have been mediated since a colleague and I mediated the first such conflict in 1974 (Bingham 1986). Perhaps more significantly, there may actually have been a decrease in the formal use of mediated negotiations in recent years. Certainly, there has been a large decrease in the size and number of organizations providing such services. The only increase in public-policy mediation appears to be in the area of "regulatory negotiations" rather than in project-specific applications.

The Canadian experience may well be as rich as that south of the border. And it is clearly more relevant to the social, political, and legal contexts with which this workshop is concerned.

Let me make what may be viewed as a radical suggestion: Canadians interested in understanding how, when, and where to use mediated negotiations should look to their own labour relations experience, particularly in the public sector. Some of the best Canadian experience has come from labour relations mediators who have applied their skills to complex natural resource conflicts. Leon Mitchell and Michel Picher come to mind. I also learned to mediate in the Canadian labour-relations milieu.

Myth 2: Canadians are less "confrontational" than Americans.

Perhaps this should be rephrased: "Canadians have less opportunity to raise legal issues than do Americans." I recall returning to the University of New Brunswick (where I had taught a few years earlier) for a series of lectures on dispute settlement in "community disputes." The reaction from the audience was generally, "Very interesting, but that kind of thing just doesn't happen here." Yet, in the previous few weeks, New Brunswick farmers had blocked the Trans-Canada Highway by dumping potatoes in a protest over prices, parents had chained school buses together in a protest over school consolidation, and someone on the Maine side of the border — reportedly Canadian — had diverted a steam and flooded out a pulp mill that had been polluting the St. John River.

Myth 3: Canadians do not have access to the courts to oppose environmental actions.

While Canadians may not have the range of opportunities that are available to Americans to gain standing in the courts to challenge the actions of governments and private entities, I was struck by Dorcey's data on the Canadian experience. Looking only at "Type I" disputes, for example, seven of 13 negotiations were triggered by actual or threatened legal action. Of the remaining six examples, three apparently resulted from the threat of some other adjudicatory action and two were imposed through adjudication.

The most important prerequisite to negotiation is two or more parties who must reckon with one another. Often it is the threat of legal action and its attendant delay that provides citizen-based groups with the ante to enter the game. There appears to be a growing level of innovation in finding ways to achieve this end in Canada.

There are, of course, differences between the two countries; however, they are matters of degree. In Canada, for example, there seems to be a greater willingness to value public order over unbridled individual freedom. Therefore, the use of disruptive tactics in an effort to gain attention may meet with less public tolerance than in the United States. Private citizens and their organizations find it harder to gain standing in the legal system, particularly in actions against public bodies. Environmental organizations may have to be more inventive in their efforts to gain access to the decision-making processes. Provincial cabinets have broader rights to overrule established

EIA processes and the recommendations of subordinate bodies without formal rights of appeal. Environmentalists are suspicious of the viability of the agreements and commitments of agencies.

CONFLICT, POWER, AND NEGOTIATIONS

It is important to remember that "negotiation" is not just another name for "citizen involvement" or "citizen participation." Negotiations occur when conflicting interests mutually agree to seek some common solution to their differences. Negotiation is shared decision making for a specific set of issues over a stipulated period of time. The dispute is settled if the parties agree. If they do not, the dispute continues. Unfortunately, negotiation is often touted as a means of avoiding conflict; it is not. It is a means of settling conflict. Without a conflict, there is nothing to negotiate. Further, constituencies of interest often require a conflict to develop a following and the power or influence to be taken seriously. Those interested in increasing the opportunity for using negotiation need to look at means of legitimizing and increasing opportunities for conflict and for building power. Mediated negotiation is the result of conflict and empowerment, not a means of avoiding it.

This is one area where the labour experience is particularly instructive. Formal dispute settlement structures based on negotiations that legitimized and empowered labour organizations were constructed so that physical confrontation and economic disruption would not be a prerequisite to each negotiation. Where the parties could not agree, provisions to facilitate or require settlement were established.

NEGOTIATIONS AND THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

The most important role of the U.S. National Environmental Protection Act, with its requirement that an environmental impact statement (EIS) be prepared for proposed projects, may be that it provides citizens' groups with a cause for legal action. Decision makers are under no obligation to make decisions suggested by the EIS — only to consider alternatives. Court actions center on whether "all" alternatives were considered, or on whether procedural errors were made. Even if a court challenge is upheld, the result is another EIS. Perhaps the only people who really take EISs seriously are those whose jobs depend on preparing them.

I suspect that EIAs have little more credibility in Canada. Therefore, to graft dispute settlement systems onto the EIA process may not add to the legitimacy of either.

The EIA Process and the Timing of Negotiations

Typically, an EIA process is the first intimation some parties receive that there is going to be conflict. Dispute settlement at this point has little hope of success. At best (from a project proponent's point of view), it may be possible to "cool" a situation. Where negotiations are attempted, the project proponent may select representatives of another "side" that does not exist. If a conflict does arise at a later date, these "leaders" will be discredited and whatever was agreed upon will be repudiated.

An alternative result of "too early" dispute settlement efforts may be represented by the Type 2 and 3 disputes described by Dorcey and Riek. Government agencies become surrogates for private entities and interests. Indeed, it may often be the hope that this type of implicit bargaining will occur that makes negotiative processes attractive to agencies.

Equity vs. Science

The essential natures of the EIA and negotiation processes are different. The EIA is designed to address issues of economics, science, and technology. Even those social impacts that are addressed are approached in a largely impersonal manner. What is "best" for the impacted individuals and community is determined by experts rather than by those directly affected. Negotiations, however, are oriented toward matters of equity. Too often, debates over science and technology are surrogates for issues of policy and equity. There are means of structuring negotiations in such a manner that scientific issues are dealt with independently and answers are found to agreed upon questions (Cormick and Knaster 1986). However, little evidence exists that a process designed to find "right" answers and "facts" can also be used to address questions of policy and equity.

This is not to suggest that the EIA and negotiation processes cannot be linked. However, they may need to remain independent. Negotiation may be able to define the questions that the EIA process is asked to answer.

Problem or Solution?

Most complex public policy disputes have two distinct sets of issues and parties: those concerned with the problem and those concerned with the solution. Solid waste management is a typical example. In any urban area, there are a number of organizations and interests concerned with the civic problem of how waste is handled. These include public officials, "good government" groups, environmentally concerned organizations, and those involved in the waste "business" (haulers, site operators, recyclers, etc.). These tend to be premobilized and concerned with the broad policy issues. However, when a solution is found — a new landfill site is identified, for example — a new set of parties and issues emerges. New parties include those who live adjacent to the proposed site, rate payers who discover rates will increase, and even advocates of policy positions who "lost" or were ignored, such as incineration advocates and recyclers.

Interesting opportunities may arise to meld the EIA and negotiations processes taking into account these two stages. Negotiations could be structured to deal with the policy issues and reach agreement on the scope and specific targets of an EIA, and even who would prepare it. When the specific on-the-ground or "solution" issues arose, the EIA would have independent credibility and the focus could appropriately be on the specific impacts and equities of the project.

BUILDING DISPUTE SETTLEMENT PROCESSES

A colleague, Jonathan Brock, and I have recently studied experience with the development of dispute settlement processes in natural resource and planning disputes (Brock *et al.* 1984). It appears that there are three critical elements, each of which must be addressed, if a process is to be successfully implemented.

Developing the Process

Generally, if those who are expected to use a dispute settlement process do not see the need for such a mechanism or are not involved in its design and implementation, it is unlikely to work. The essence of negotiation is the willingness to seek an agreement. People can be forced into negotiations but they cannot be forced to be agreeable or to search for mutual solutions.

Evidence suggests that the least promising way to develop a system is to import it from elsewhere. Indeed, developing a system can be very similar to negotiating a site-specific conflict. Dispute settlement processes that are successful have generally themselves been the result of negotiation. The key parties need to be involved, a recognition of the legitimacy of all participants is necessary, and the system itself should reflect the concerns and realities of those it is expected to serve.

The Structure

Certain critical elements in the system itself are indicators of its ultimate success. Here again, the labour-management experience is instructive. Briefly, successful systems 1) provide some means of identifying parties and spokespersons, 2) assist in defining the issues, 3) set standards for bargaining "behaviour", 4) establish deadlines for various stages in the negotiations, and 5) provide some means of imposing finality or closure. Successful systems also 6) tend to be flexible and can be shaped to fit the realities of the specific situation, 7) are structured to complement existing decision-making processes, and 8) have some measure of independence from ultimate decision makers.

Implementation

Finally, there are a number of factors that appear to determine the successful implementation of a process. First, the overseeing or policy direction of the system should involve the parties. This helps keep the process legitimate in the eyes of the disputing parties and also helps to maintain some level of independence for the process. Second, those responsible for the initial implementation and administration of a system need to have a good understanding of the negotiation process, the use of third-party intervention techniques, and the political milieu within which disputes arise and must be resolved. Third, the initial disputes that are handled by the system must be carefully selected and the initial use of the process nurtured. Early success will be critical. It is sobering to realize that there have been many more failures than successes in establishing dispute settlement systems in environmental and natural resource conflicts.

DEFINITIONS OF SUCCESS

Definitions of "success" in mediated negotiations will inevitably differ. It is important to recognize these differing perceptions if the process is to serve the needs of the many interests and constituencies expected to use a dispute settlement system.

"Conflict Avoidance" and "Containment"

As already noted, some elected officials and public administrators tend to see the use of dispute settlement processes as a means of avoiding or at least containing conflict. Dispute settlement processes are designed to settle disputes, not avoid them. Attempts to use such systems to avoid conflict can only discredit the process.

The question of "containment" is somewhat more complicated. As noted, labour-management dispute settlement systems have contained or lessened the level and frequency of overt physical confrontation. They make disputes legitimate and formalize opportunities for addressing differences. An effective dispute settlement system makes disputes less disruptive on an *ad hoc* basis by making them more efficient. It enables the parties to confront the issues without the necessity of legal, political, or even physical confrontation.

Making "Good" Decisions

The quality of agreements that result from mediated negotiations will always be a concern. Some would argue that quality should be judged on the basis of some abstract or absolute measure of meeting the "public good." Others would define quality in terms of dealing with scientific and technical matters. Still others define quality in terms of how well the agreement meets their own definition of the "right" answer. A mediator assumes that the public interest is best determined by the publics who care sufficiently about the issues to become involved and try to reach agreement. Assuring that the "general public" is aware of both the process and the agreement provides additional assurance that no one is so disadvantaged by the agreement that they will actively oppose its implementation.

A successful system will result in agreements that meet these tests and that are technically, economically, socially, and politically viable.

"Fair and Equitable"

If a dispute settlement system is to be successful it must be seen as fair and equitable in its application. All affected interests must be perceived to have had an opportunity to participate effectively. This requires access to relevant information and to technical and scientific advice. There must also be a perception that all parties — and the ultimate decision makers — participated in good faith.

This may require that the system have some ability to provide various kinds of technical and financial assistance to variously disadvantaged parties. Canadian government agencies have been far more willing to provide the necessary financial assistance to environmental and other groups than have their American counterparts.

Was an Agreement Reached?

The simplest measure of success is whether or not an agreement is reached. This is typically the measure that is applied by a labour mediator, who can assume that the parties are well able to recognize and pursue their individual self-interest.

However, there are instances when agreements are reached that are not ratified by constituents. If the representatives negotiating have failed to adequately represent their constituents, this can be a "failure" — it is often better never to have agreed at all than to have agreed and been over-ruled by those who must approve the accords.

There are also times when failure to reach agreement can nevertheless be seen as a positive, if not "successful" use of the process; the parties conclude that the issues have been narrowed, some have been settled, and the remaining issues continue to be pursued.

Finally, the parties may stipulate the areas of disagreement that remain. The means for resolving these remaining issues may be specified, such as adjudication, legislative action, or even a polling of the affected electorate.

Implementation

In complex public disputes, actual implementation of an agreement may take years. Realities may change such that an agreement cannot or should not be implemented as originally drafted. It is also impossible to foresee all of the contingencies that may arise in the implementation of an agreement. For this reason, it is imperative that agreements contain procedures for addressing disagreements and changing realities during the implementation process.

ON THE NEED FOR TRAINING NEGOTIATORS

The real growth industry in the field of mediated negotiation is the training of negotiators and mediators — often for opportunities and positions that do not exist. The field has become the darling of academics and trainers. More has been written on the sparse experience in the mediation of environmental conflicts than on the entire history of labour-management mediation — where there are probably more mediation efforts every week than in the entire environmental dispute settlement experience to date!

A problem with the training that does occur is its tremendous emphasis on what occurs "at-the-table." My own experience suggests that a prior, more important concern is an understanding of when and how to provide a framework for negotiating; the best negotiators can only fail if the process is not correctly structured.

The most effective negotiation training deals with more than table manners. It is designed to aid the prospective negotiator in understanding the context within which negotiation skills will be applied. It is important to gain some understanding of the perceptions and realities that other parties bring to the negotiating table. Some of the most effective negotiation training we have undertaken gives the various interests the opportunity to develop skills together. For example, in one situation representatives from local, state, and federal agencies, oil companies, environmental groups, and native organizations jointly attended a three-day seminar on how, when, and where mediated negotiations would be appropriate in disputes over offshore oil development in a particular geographic area. The instruction team included a number of individuals whose organizations and positions were similar to those of the participants and who had experience in the use of the process. This gave the various interests the opportunity to "learn" together so that one "side" was not perceived as having gained an advantage. "Real" people were far more credible than trainers and mediators in "selling" negotiation processes. By interacting in the training, persons from various "sides" were able to exchange their perceptions of each other and explain the types of organizational constraints that they faced — perhaps the most important insights of all in learning to negotiate effectively. A variety of simulated disputes were negotiated. Prospective negotiators had the opportunity to "try out" different positions and roles.

This training structure ensured that the experience was immediately relevant and applicable for participants, heightening their level of involvement. Perhaps most important of all, they came away with a better understanding of those they would be dealing with, a greater understanding of the problems and perspectives of differing organizations, and lots of home phone numbers and first names.

The most important lesson we have learned in training is that every program should be specifically designed to meet the needs and realities of a relevant situation. There should be some common set of issues and concerns that engage the participants. If the training is carefully structured, the participants will learn more than narrow negotiating skills.

A CONCLUDING COMMENT

In Canada, there is an excellent opportunity to move forward in the use of negotiation-based approaches for the settlement of environmental disputes. There is a rich labour negotiations and natural-resource dispute-settlement experience to draw upon. There are Canadians with demonstrated skill and experience in dispute settlement processes.

However, I have attended at least five seminars like this in Canada. The same ground is ploughed each time. Perhaps, as many Americans allege, Canadians have a strong cautious streak. I urge you not to study the concept to death. Look for opportunities to try it out. Develop legislation and projects as demonstration efforts that are expected to be reviewed, changed and, perhaps, discarded.

I believe the risks are minimal, particularly when compared to the possible benefits of using negotiation processes in settling a range of environmental and natural resource-based disputes. Put the same energy into implementing the process that has been expended in studying it!

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ACCOMMODATING NEGOTIATION/MEDIATION WITHIN EXISTING ASSESSMENT AND APPROVAL PROCESSES

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INTRODUCTION

The title of this paper assumes that the case for negotiation and mediation has been made, and that all that remains to be shown is how to make it work. While it is tempting to remake the case for negotiation, my pro-negotiation comments will be confined to those points that touch on the principal task, namely, how to adjust or modify existing structure to accommodate negotiation and mediation. This question invites an examination and analysis of what is needed institutionally, if anything, to make negotiation work or, perhaps better still, an evaluation of *why* negotiation and mediation have not yet realized their much-touted potential and *how* that potential might be reached.

Such a task requires the following:

- an identification of the obstacles that preclude or impede negotiation and mediation; and
- a determination of what institutional adjustments, if any, are required to overcome these obstacles.

First, a brief discussion of some preliminary points. These points are raised as a series of questions and possible answers. The answer to each question will determine, in part, whether institutional change is needed.

- What is the role of negotiation and mediation?
  - — to facilitate existing decision-making processes, or
  - — to provide a wholly separate and alternative technique for making decisions.

If the former, then clearly institutional adjustment is needed; if the latter, then it is not.

- Are some issues more amenable to resolution through negotiation/mediation than others?
  - — Yes, constitutional, broadly based public interest issues and questions of principle are best resolved through legislative and adjudicative processes. On the other hand, complex, polycentric problems between parties with an on-going relationship are more susceptible to resolution through negotiation and/or mediation.
  - — No, all issues can benefit from, if not be resolved by, negotiation and, where appropriate, mediation.

The implications of this point for institutional change are not clear. In some senses both answers demand institutional change or adjustment — the first because a mechanism is needed to distinguish between case types, the second because a mechanism is needed to integrate negotiation into existing decisional processes.

- Is there a point at which an issue is ripe for negotiation/mediation?
  - — Yes, negotiation cannot proceed until an issue is "ripe for negotiation" in the sense that the parties to a dispute have been clearly identified, the parameters of a dispute are reasonably well defined, and a determination is made by the parties that negotiation is preferable to any other process.
  - — No, negotiation may be used at any point in the decision-making process and should probably be an integral element, from the identification of issues to the resolution or mitigation of specific conflict.

Again, the institutional implications of this point are not obvious. I believe, however, that some form of institutional change is probably needed to accommodate negotiation whatever the answer. Once an issue reaches the point at which it is properly characterized as a dispute, the parties are, or will soon be, locked in conflict and see little reason to change their adversarial tactics or avoid adjudication. Institutional support for negotiation, mediation, and joint problem solving may change these organizational mind sets. If, on the other hand, negotiation is used throughout the decision-making process, institutional provisions may be needed to answer such questions as who is a party, how does each party ensure effective representation, and so on.

- What is the goal of negotiation?
  - — *Conflict avoidance:* Early negotiation is likely to lead to ways in which the parties can engage in mutual problem solving and not become embroiled in unproductive competition and conflict.
  - — *Conflict resolution:* Once an issue becomes a dispute, negotiation may identify ways in which it can be resolved to the satisfaction of all parties.
  - — *Conflict mitigation:* Some disputes within society are not amenable to resolution, at least not in ways that satisfy the interest of all parties. Thus negotiation may play a

role in monitoring and fast-tracking remedies to future disputes.

— *Some or all of the above:* if all of the above, then efforts to determine if an issue is negotiable or to find the point at which an issue is ripe for negotiation/mediation are largely misplaced. Negotiation should be a continuous part of the decision-making process, not an appendage added as a last or second last step.

Of course, institutional change may facilitate and enhance any or all of these answers. One concern is that if negotiation is institutionalized as part of a formal, government sponsored and directed decision-making process, it loses some of its flexibility and creativity. On the other hand, without institutional support and supervision, negotiation may languish in obscurity or, worse still, be practiced without the procedural and substantive safeguards necessary to generate good results.

Whether negotiation is institutionalized or not, it is essential that its deficiencies be identified and corrected if it is to enhance decision making. Before proposing *how* the corrections are best brought about, it is necessary to document the problems and summarize the potential solutions. These problems and proposals are examined for their solution under four broad headings: participation concerns, informational concerns, organizational concerns, and philosophical and legal concerns.

PARTICIPATION ISSUES

Who Should Participate?

Who should participate in a negotiation process, or by what process are participants identified? Unlike the well-developed standing rules of adjudicative bodies or the largely predetermined participants of the legislative process, negotiation may include an almost unlimited number of participants. The lack of clearly developed rules about who may participate creates a myriad of problems. Key parties may be excluded from the table, with the result that agreements are generated that favour the participants to the detriment of the non-participants. If a particular group or set of interests are continually excluded from all or part of decision making, the cumulative effect of such systemic discrimination may threaten the whole process. On the other hand, marginal parties who have a seat at the negotiating table may wield disproportionate influence over the outcome of the process. Parties with identical or overlapping interests may each demand and receive a separate seat at the negotiating table, thereby increasing negotiating costs and expanding the number of participants well beyond an optimal level.

At one level the answer is obvious: anyone who wishes to participate should do so. There is little danger that such a broad test will generate too much participation. Participation is time consuming and expensive. Those with a sufficient economic interest in the process will find the time and the resources to participate; those without, will not. But such an answer is not very satisfactory. Participation for some is far easier than for others, even though the degree of affectedness may ultimately be the same. Take a major northern resource development decision for example. The proponent's interests are specific, well defined, and fairly easy to calculate. The regulator's interests on the other hand, are less obvious and perhaps even contradictory. For example, the regulatory body may be pursuing the potentially contradictory objectives of economic prosperity for the region and the country and environmental and cultural protection for the directly affected community. The interests of those who live within the affected community will be even more difficult to identify and represent, particularly if the community is not cohesive and well organized. The community may want to participate, but the costs of organizing the community, reconciling conflicting interests into a coherent position, and presenting those interests at the negotiating table are enormous — certainly more than any one individual can bear. These organizational or so-called "transaction costs" normally preclude spontaneous participation from some private and public interest group and demand some form of assistance. But once financial assistance is available to subsidize participation costs, the number of potential participants is likely to exceed the number of persons with a real or direct interest in the outcome of the negotiation. This, in turn, requires a cap on participation funding and guidelines to determine who receives what. In this way, the process by which financial assistance is allocated becomes the process by which most participants are identified. Public interest or intervenor funding thus becomes the screening device. The criteria by which funds are allocated may also be used to rectify other potential problems such as eliminating overlap, the duplication of effort in the production and analysis of information, and so on.

As a mechanism to facilitate effective participation, intervenor funding must, in my view, meet certain objectives. It must:

- fairly distinguish between the key actors and the marginal players, and between those with high transaction costs that justify funding and those with low transaction costs;
- provide sufficient funding to enable a participant to make a real contribution to the decision-making process; funding must begin at the early organizational stages and continue through to the implementation stage;
- encourage, but not require, funded parties to explore ways in which they might combine resources to increase their effectiveness; and, perhaps require that a portion of the funding be repaid if resources or success at the negotiating table permits.

In the past, some of these objectives have been met through intervenor funding programs. The great defect of even the best funded programs is that they have been *ad hoc*, unpredictable, and often after the fact. Potential participants do not know whether funding will be forthcoming and, if so, how much and when. Many are invited to participate with only the promise that if they make a substantial contribution to the process, their efforts will be rewarded with some kind of a "cost award;" participants are thereby invited to gamble on their future. In my view, negotiation funding must learn from these experiences and be guaranteed by legislation; it must be

available throughout the decision-making process, not only for participation in an adjudicative hearing when a specific dispute arises.

A second answer to the question of who should participate is "Let the parties decide." There will be certain obvious parties in any planning, assessment, or regulatory process. It is in their best interests to design a participation plan that includes at least those persons who may overturn or undermine a negotiated agreement in some other forum, such as a court. Conversely, it is in their best interest to exclude the marginal participant. As parties are invited to participate, they too will have a say in the process and participation plan. Over a two- or three-meeting period all relevant parties will normally be determined. This process has the attraction of letting the parties decide, rather than government or a funding agency; although funding will be needed for at least some of the public interest negotiators. It is consistent with the principle of returning power to the people most affected so that they can resolve their own problems, while at the same time providing some check on the number and type of participants. The disadvantage of this approach is that it may arbitrarily exclude important parties.

Although not an effective answer, a frequently heard response is that "only those persons who have party or participant status at the adjudicative hearing should participate." Another variation on this theme is that only those persons who have the legal capacity to block an agreement should participate. The problem with this approach is that it leaves the so called standing or participation issue to the hearing body. While Canadian boards and commissions (but not always courts) have been very generous recently in granting standing to interested parties, there is no guarantee that such generosity will continue. Appropriate standing criteria should be developed beforehand, rather than leaving both the criteria and the application of the criteria to the courts and hearing bodies.

How to Encourage Effective Participation

How should negotiation respond to the reluctant participant? Negotiation is not likely to be successful unless all affected parties are represented. For this reason, the "holdout" may wield inordinate power over the process. Should reluctant parties be legislatively required to negotiate in good faith as they are in the labour field? Or is that inconsistent with one of the fundamental tenets of negotiation; namely, that it is a voluntary process and each party should be free to pursue its own best interest as it chooses. If the answer is yes, is it incumbent upon the process managers to provide the participants with the resources to participate effectively? Participation, especially from public or special interest groups, without sufficient resources, may merely serve to legitimize a seriously flawed process.

A second set of questions or concerns relates to the regulatory department and how to guarantee its participation. Here the problem is not a lack of resources but rather organizational jealousy.

Regulatory departments believe that they speak for the affected public, using that term in the broadest possible sense. To suggest that they participate in a process in which the public is represented directly by others implies some criticism of the department's past record and perhaps even a lack of confidence in their present ability. In these circumstances, departments are likely to shun mere "party status" in favour of that of an honest broker or mediator in which they attempt to meld the competing "private" interests of the parties into a departmental view of an acceptable "public interest."

A second departmental objection to participation in negotiation stems from a perceived conflict of interest among the various roles it may be called upon to play. Thus, being a final adjudicator of issues that remain in dispute, department officials may feel that their participation in the earlier process prejudices their objectivity as decision makers. As a policy advisor, the agency may not wish to delegate its authority to a negotiating process but rather maintain its influence and effectiveness by remaining aloof, regarding any consensus reached as "just another input" in the combination of factors that help determine its final advice. As a regulator, the department may also feel that participation in a negotiating process impairs its subsequent task by fettering discretion and impairing objectivity. In spite of these concerns, it seems clear that without agency or departmental participation, negotiation is not likely to produce lasting agreements. This is clearly a case in which agency participation may need to be legislated or mandated by regulation.

The right or opportunity to participate is one thing; effective participation by a participant is quite another. Effective participation relates to a whole cluster of issues concerning the resources (financial and non-financial) available to the participants, the bargaining power of the participants, their training and negotiating experience, and the personal skills of the negotiator. Inevitably, some people will be better negotiators than others. In those processes in which the final decision rests with a professional decision maker (a judge or board member), there is some check against the worst effects of inadequate representation. In negotiation there is none. Should negotiated agreements be reviewed or confirmed by a third party — as a matter of course, or only if one or more of the parties requests such review? If so, reviewed on what basis?

Who participates and effective participation are closely linked. Whether a party participates in a negotiation depends largely on whether it believes its participation will be effective. No group wants to add credibility to a process through its participation if it believes that it can further its objectives in some other way. The decision to participate is, of course, ultimately a strategic one for the group — is negotiation at this time the best course of action? But it is also a problem for those grappling with an appropriate institutional structure for negotiation and mediation. Parties will only negotiate if they believe that they have the *power* to reach a good agreement, or if they believe that the potential results of a negotiated agreement are preferable to anything they might achieve through some other process. This raises the issue of the relative bargaining strengths of the parties and the problems of

unequal power among potential parties. In one sense, inequality is a fact of life. In another sense, it poses some special problems for negotiation and mediation. Negotiation, unlike adjudication, is a consensual process. A successful result means that the parties have reached agreement, not that a decision has been imposed on them. If negotiation is to be promoted as a decision-making process, it is essential that the parties have the power and resources to participate effectively.

Effective participation is difficult to achieve. To the extent that it is a function of financial resources, access to information, and even negotiating skills, institutional arrangements can be of some assistance. To the extent that it relates to bargaining power, legislative and institutional provisions can play a key role. For example, resource developers in Ontario did not begin negotiating with municipalities and Indian bands until environmental assessment legislation gave those groups the power to request a hearing and impose considerable costs (financial and uncertainty) on the proponent.

Multi-Issue Participation

An additional participation problem stems from the fact that while adjudication tends to focus on specific and discrete issues that arise out of a particular fact situation, negotiation may encompass every aspect of a decision. Thus, as a negotiation moves from the broader policy components of a decision to the more site- and technology-specific components, the affected public and hence the interested participants will tend to change. What is needed is to ensure that negotiations are dynamic and able to accommodate new participants as issues and interests change, and that the process is sufficiently rigorous that it does not become an inconclusive public forum on the issues at hand.

Representativeness and Negotiating Tactics

Some participation problems are not unique to negotiation, although they may be more difficult to resolve in this setting than in most others. One such problem concerns the representativeness of the participants. Many groups, especially public interest groups, are not homogeneous, but rather reflect a wide spectrum of views and opinion. These groups will find it especially difficult to appoint and properly instruct a negotiator, particularly if the negotiations cover a broad range of interests. Indeed, the process by which such groups reach a sufficient level of consensus to even participate in negotiations may be more time consuming and expensive than the actual negotiations. These are transaction costs that a single-interest party will not have to bear. Worse still, the task of reaching group consensus and appointing a single negotiator may be the very antithesis of the *modus operandi* of a broadly based public interest groups. The organizational structure needed to facilitate and sustain effective negotiation, namely, a highly centralized, hierarchically structured organization, may put unbearable strain on the group. Finally, if negotiations cover a multitude of issues and continue over a long time-period, participating parties, like the issues on the negotiating table, will change and so will dynamics of the negotiation. This is healthy. But if the parties are not prepared for such changes or do not have the organizational ability to respond to them, they will find negotiation too unpredictable to live with.

A final "participation" problem relates to negotiating tactics. Most negotiators assume rational objective-maximizing behaviour from their counterparts across the table. Often such behaviour is not forthcoming and negotiations are frustrated. Whether this problem requires a solution depends, in part, on the reason for the behaviour. If it is incompetence, perhaps a sensible response is to propose negotiating training. More likely, it is a deliberate negotiating tactic. In such cases, training may assist the other negotiators to negotiate more effectively with the "irrational actor." On the other hand, an experienced mediator may be able to deal with the problem.

INFORMATION ISSUES

Information issues clearly relate to negotiating effectiveness, a matter addressed in the preceding section. Nevertheless, they are sufficiently important that they deserve separate treatment.

In discussions with public interest groups, local community groups and other potential negotiators, "information problems" are often described as standing in the way of successful negotiation. Parties sometimes complain about a lack of information, wrong or biased information, indigestible information, and even too much information (or too little relevant information). These complaints are not unique to negotiating parties. They arise in every context and are partly a function of society's inherent inability to generate perfect information about every potential issue, especially those associated with environmental risk.

Information problems in the negotiation field are expecially acute for two reasons. Negotiation tends to be far more information-intensive than litigation, especially for public interest groups. It is one thing to discredit a key part of a proponent's evidence before an adjudicative body; it is quite another thing to generate the facts to persuade a proponent to adopt an alternative course of action. Public interest groups lack the resources to stay out of court!

The second reason relates to the process itself. Because negotiation is a consensual process, the parties must reach a point (a level of knowledge, sophistication, and confidence about an issue) where they can *agree*. It is easy to know what you do not want; it is much more difficult (in part because negotiation is so information-intensive) to know what you want or are prepared to accept. Agreement means that there are no scapegoats on whom an unpopular result can be blamed. The parties *accept responsibility* for their action. However, for parties to reach agreement they require full and frank disclosure of all facts as well as the ability to conduct an independent analysis of the facts, or at least an ability to rely on information and analysis generated by an independent body.

Mechanisms can be put in place to ensure that each party has the resources to generate the necessary information; or procedures can be designed and grafted on to the negotiation process that will generate a common information base from

which the parties will negotiate. Of the two solutions, I prefer the first because it maximizes participant autonomy and permits them to generate their own data, pool information with like-minded participants, or contribute to a common information base as each deems appropriate. On the other hand, information is never neutral or value-free. It reflects the biases of those who ask the questions, generate the data, and conduct the analyses. Thus, to the extent that the institutional framework encourages each party to generate its own information rather than subscribe to a common fact-finding process, there will be some push toward contradictory and competing information bases that may make joint problem solving difficult.

ORGANIZATION ISSUES

Organization concerns relate to the organizational structure of potential parties. Are there structures that inhibit organizations from participating in a negotiation or mediation? Is there anything about organizations or particular types of organizations that make negotiation and agreement especially difficult for them? Although answers to these questions are difficult to verify, my sense is that there are some serious organizational problems.

Organizations tend to reflect the environment within which they work. As a result, those organizations that have traditionally intervened in the decision-making process as litigants will tend to be structured in ways that enhance that role. They may have "in-house counsel" who will shape intervention strategy. Such a strategy may include "rules" as extreme as the following:

- disclose no information except that which you are required to disclose;
- communicate with other parties only on a counsel-to-counsel basis, or at least with counsel present during the communication;
- exaggerate claims and bottom lines;
- seek substantial concessions from the other side even as you move away from extreme positions;
- oppose all positions and claims, however reasonable your opponent's position may be; and
- establish unreasonable conditions precedent to any discussions with the other side.

Counsel who advise an organization has much to lose if matters are settled quietly and quickly. The loss may include fees from lengthy hearings, control over the process, and little or no public recognition for the role played.

Some organizations will be more prone to litigate (or not negotiate) than others. Those with limited resources may find that they get much more "bang for their buck" through strategic public-hearing intervention than full-scale negotiation. Those who lack real negotiating power and thus the confidence to negotiate may prefer to have the decision of an adjudicative body that is imposed on them rather than the agreement that may be "extracted" from them at a one-sided negotiation. At least *imposed* decisions can be criticized as insensitive and wrong; a "consensual agreement" cannot be. These factors all combine to create either institutional ambivalence toward negotiation or open hostility.

Often the organizational structure needed to negotiate effectively is the very antithesis of a public interest organization. As a result, their participation at negotiations may be sporadic and haphazard. The cure, however, may be worse than the disease. To transform such an organization into an effective negotiating unit may detract from its *raison d'etre* as a broadly based, multi-issue public interest group.

Organizational constraints within government bureaucracy may be even greater. Large bureaucratic structures may have many reasons for frustrating negotiation and mediation. First, this process threatens to reduce their control because as "another party at the negotiating table" they are afforded no special status, and have limited ability to influence the outcome of the negotiations. An agreement may be better than anything they would have imposed, but it is not theirs. As a result, government departments often shun participation at the negotiating table in favour of the role of overseer of the process or final decision maker.

PHILOSOPHICAL, PROCESS, AND LEGAL ISSUES

A number of critics of negotiation and mediation have raised serious doubts about the desirability of this form of private dispute resolution, no matter what the issue or how negotiation is structured. The objections take many forms but principally fall under the following categories: public interest concerns, linking the process to the problem, and legal concerns.

Public Interest Concerns

Public interests arguments fall into two broad categories. The first argues that private dispute-resolution processes fail to fully consider the broader public interest that transcends the interest of the parties. More specifically, negotiation is decision making by *affected parties* rather than by publicly appointed, paid, and ultimately accountable officials. A second public interest argument is that negotiation assumes accommodation and compromise. It gives legitimacy to the status quo. As such, it discourages or perhaps even precludes much needed structural change that often involves a dramatic break from the past.

The concern that private negotiation does not properly address the public interest, however that is defined, is susceptible to a number of counter arguments. One response is to suggest that if all persons affected — however remotely — are afforded an opportunity to participate in an open, public negotiating process, then surely the public interest is at least as well served by this process as it is by any other process and perhaps better. If the quality of participation is an indicator of the effectiveness of the process and the legitimacy

of the result, then presumably direct participation at the negotiating table by all affected parties is preferable to indirect participation at the adjudicative hearing. Furthermore, there is much about traditional planning, assessment, and regulatory processes to suggest that rather than promoting the public interest they obscure and obfuscate the "real" public interest.

Take, for example, assessment boards and panels whose function it is to make decisions "in the public interest." First, the composition of these decision-making bodies does not usually represent a good cross-section of public opinion on planning and resource development issues. Second, the procedures adopted by these boards are largely adjudicative and adversarial. The process encourages parties to exaggerate their private interests and conceal their "bottom line," rather than promote their view of the broader public interest. The adjudicative process, to use Louis Jaffe's expression, "heightens the sense of the particular." It focuses on the claims and alleged rights of individuals, and squeezes out the broader public interest issues. The adjudicative process legitimizes a particular mode of discourse and discredits others. There is something fundamentally defective about a process that reduces all concerns to instrumentally rational values. And finally, to the extent that an adjudicative hearing panel seeks to uncover the broader public interest by questioning witnesses, calling its own evidence and inviting submission on points not raised by the parties, the process loses some of the rigour and integrity of an adversarial tilt between competing parties. By joining the fray, panel members inevitably call their independence into question by becoming advocates for a particular position or point of view that may not reflect the broader public interest. Most assessment and planning bodies are, to use the words of their critics, designed to provide symbolic reassurance to an apprehensive public that development is proceeding in a rational and environmentally sensitive fashion.

A second response to the "public interest" objection is simply that it fails to take into account the way in which decisions are actually made. It assumes, for example, that assessment matters are resolved by the planning and adjudicative processes created for that purpose. Nothing could be further from the truth. Most plans and projects never reach the hearing stage. The parties agree beforehand to exempt the matter from the process, to resolve the dispute before a hearing is requested, or to resolve it between the time when a hearing is requested and the matter comes before the board. A board or panel has no jurisdiction over a matter in the first two cases and somewhat limited jurisdiction in the third case. Thus, if the board is the repository of public interest concerns, it has relatively few opportunities to put these concerns into effect.

Not only is a board's opportunities to reflect the public interest in resource use decision making limited, but it may indirectly subvert the public interest it is charged with protecting by encouraging informal negotiations. Such negotiation occurs in the shadow of the board hearing and is often badly flawed. It is invisible; it does not necessarily include all the relevant parties; the parties may not be well informed; and the agreement is not subject to outside review. Thus, far from promoting the public interest, the present environmental assessment processes may subvert it by encouraging key parties to negotiate exemptions without input from the potentially affected public.

Finally, I find the "public interest criticism" of negotiation to be both contemptuous and presumptuous. It is contemptuous of the ability of people to solve their own problems in their own way, a way that fits well within the social fabric of the time. It is presumptuous because it assumes that there is a public interest that will, with enough effort, be gleaned by a panel of energetic and wise decision makers. I have seen very little evidence to suggest that boards and other decision-making bodies are the repository of much energy or wisdom, or that their decisions conform to some superior view of the public interest.

While most objections to negotiation based on this public interest concern can be answered, I am still a little uncomfortable about one point. Private negotiation will tend to focus on the interest of those at the negotiating table and ignore or undervalue the interests of those who are not or cannot be represented. No matter how broadly the participation net is cast, some will be excluded. Who, for example, represents the interests of future generations? Who is there to ensure that long-term environmental values are not sacrificed for short-term financial gain? Who is at the table to ensure that like cases are decided in the same manner? And who is there to oversee the precedential value of a decision? While I am not persuaded that the adjudicative process is any better equipped than negotiation to answer these questions, that does not mean that these negotiation problems do not need to be resolved. A good mediator may resolve some problems; public review of agreements may resolve others. Perhaps the best solution is to ensure that *all* interests are represented (persons can be appointed to represent future values) and that representatives have sufficient resources and information to represent those interests effectively.

Rather than opposing negotiation and mediation as being contrary to the "public interest," existing decision makers would be better advised to seek the authority needed to supervise negotiation and mediation and review publicly all negotiated agreements. This, however, raises the spectre of a potential conflict of interest between the responsible authority's statutory obligation to decide and its new responsibility to oversee the conduct of the parties prior to a public review. The conflict is probably more apparent than real. Courts and most adjudicative bodies already have the power to encourage agreement through pre-hearing meetings and conferences. No one seriously suggests that this disqualifies a board member from subsequently hearing the case. If there is a potential conflict, the board member who oversees the negotiation need not be the one who hears the case.

Linking Process to Problem

Negotiation, as a process, fails to distinguish between those issues that are amenable to resolution through the give and take of compromise and those that are not. As a result, there is a potential danger that negotiation will be used to erode matters of principle. In the environmental field, this means that

the only relevant question that lies behind the decision to negotiate is "How much development and degradation?" and not "Should there be any development or any pollution at all?" In other words, the decision to negotiate with adversaries means that one respects the legitimacy of their position. For those whose principles are non-negotiable, the decision to negotiate represents a capitulation. This point was well illustrated recently in President Reagan's decision to negotiate with Iran over arms and hostages, and the Canadian federal government's decision to negotiate with the United States over the imposition of a federal tax on soft-wood lumber sales. Criticism of each negotiation exercise stems largely from a strongly held view that the process and the result merely legitimized the otherwise illegitimate position of one's adversary. In other words, the objection is not that the negotiations were unprincipled (although perhaps that too), but that the very act of negotiating compromised matters of principle.

An even more dramatic way of illustrating this point is to ask when should one resist the proponent at all costs (e.g., principled and unbending opposition to a proposed resource use) and when should one accede to at least some of a proponent's demands (negotiate a more modest or less harmful proposal in return for support for the project). From a societal perspective, negotiation is not acceptable if it is used to legitimize that which is unacceptable to society. From a personal or individual perspective, negotiation is obviously not acceptable if it entails a capitulation of firmly held moral beliefs, such as revulsion toward anything nuclear, or toward the extinction of wild animals.

Again, concerns that fall within this category are not as serious as they might first appear. Although some issues are better resolved by one process than another, the parties will normally sort these out. Surely we can expect the parties to determine which cases are best resolved by negotiation and which ones are not. Indeed, to second guess the parties about whether an issue belongs at the negotiating table smacks of a kind of paternalism that negotiation/mediation was designed to overcome. If not, it is possible to add a variety of institutional checks and balances to existing decisional processes that will help determine whether the problem might be resolved through negotiation. A formal negotiation process could also include a pre-negotiation fact-finding component, designed to determine whether the issues are ripe for negotiation or indeed whether the issues are amenable to resolution through negotiation. Alternatively, the responsible authority might establish criteria to help the parties identify issues that might be the subject matter of a negotiation.

While the criteria would not be easy to develop or apply, potential items might include:

- the size, complexity, and inter-relatedness of the issues;
- whether the issues and parties are sufficiently well defined and identified to permit successful negotiation (the ripeness of the dispute);
- whether the issues raise important constitutional or public policy issues that require a definitive public pronouncement;
- the relationship of the parties to the dispute; and
- the need for a clear precedent on the issues in question.

While these suggestions might address some of the problems raised in the preceding section, I suspect that they are largely counterproductive. If negotiation is available and if the parties are knowledgeable about the negotiating process and if they have the resources to negotiate effectively, then they should be left to decide whether to pursue negotiation. If negotiation does not fit the problem, they will soon find that out and abandon the process. On the other hand, if issues are pre-screened to determine their suitability to negotiation, we add another expensive step to the decision-making process that may either prohibit negotiation in cases in which the parties would have preferred it, or encourage it when it is contrary to the best interests of one or more parties.

Finally, the suggestion noted above presupposes a very limited role for negotiation. If negotiation/mediation is seen as a mechanism for resolving *disputes*, then it will often prompt the question "Is the dispute appropriate for negotiation?" On the other hand, if negotiation is seen as something the parties do continuously — first to avoid conflict, later to minimize it, and finally to try and resolve it — then the question makes no sense. In this broader context, negotiation simply describes the problem-solving efforts of the parties. It is not some special new device to be inserted into an existing process to resolve dispute at the eleventh hour.

Legal Concerns

Finally, those who oppose negotiation sometimes ground their opposition in an argument that adheres strictly to the legislative framework under which issues are resolved. In the environmental assessment field, the legislation may prescribe a public hearing and anything designed to avoid such a hearing has the effect of subverting the legislative purpose. It is not enough for adherents of this view that a negotiated settlement be reviewed publicly by the ultimate decisional body. They want the issue to be resolved in the formal adjudicative setting established by the act. Nothing less than that will do.

In other words, these opponents of negotiation, while not necessarily devotees of the existing process, nevertheless reject all changes except those that are clearly envisaged by the enabling or controlling legislation. When made by lawyers, this argument is liable to use such expressions as "illegal delegation of power" or "absence of jurisdiction" or "lack of legislative capacity." When made by non-lawyers, it will include phrases such as "the appointed decision makers should decide."

CONCLUSION

On balance, I believe that negotiation *should not* become institutionalized as part of existing processes, although it may certainly have a profound effect on what those processes do. Existing processes have not been particularly successful and thus are not likely to promote and foster negotiation as well as

a separate institution. While this is not the place to document their failures, neither the traditional processes nor the substantive results have won much applause. Evidence of this fact is everywhere. Planning processes are under strong attack. They are based on the principle that there is such a thing as a "rational decision" or a "good land-use plan," at a time when the public's sense is that "rationality" and particularly "instrumental rationality" is an illusive and probably undesirable goal. Environmental assessment and project approval processes have degenerated into expensive and inconclusive clashes of competing experts. And they have always exhibited a strong bias in favour of the proponent. Hence, the clamour for change. Much of the criticism is directed at the present processes and how they might be redesigned or reorganized to overcome these problems.

From the vantage point of the critical legal theorist, the criticism of existing processes is even stronger. They are said to be elitist, highly centralized, heavily biased in favour of one party (the developer or proponent), and serve to reinforce and legitimize the philosophy of dominant interests within society. To the extent that negotiation and mediation promise to wrestle power from a largely insensitive, unresponsive and highly bureaucratized government and return it to the people and local communities most affected by proposed action (or inaction), negotiation and mediation must be established as a separate and distinct process.

As a separate process, negotiation and mediation are less likely to be inhibited by existing processes. Agreements that are negotiated in the shadow of an adjudicative assessment hearing or a legal hearing will be shaped by the parties' expectations of that process. Thus, theories of liability, possible defences, the range of potential remedies, even the parties to the negotiation will all be influenced by the "other" process. Even if negotiation is established as a *separate* process, it will continue to be influenced by the adjudicative hearing. Often it is the prospect of an expensive and unproductive hearing that brings the parties to the negotiating table. Having provided this kind of leverage, it is inevitable that the negotiations will be influenced by this other process.

As a separate process, there is more opportunity for experimentation and more likelihood that negotiation and mediation will be promoted. This is not surprising. Those charged with administering other processes may be reluctant to promote negotiation. If successful, they may put themselves out of business, or reduce their work load to the point of staff cutbacks. Furthermore, experimentation by process managers may be limited to only those approaches that enhance and perhaps even expand their own process. While it is difficult to generalize on this point, there would seem to be some correlation between those who promote hearing processes and those who do not support negotiation.

What institutional support would such an approach require? Listed below is a partial list of potential requirements:

- education, promotion, and information programs;
- intervenor funding;
- subsidies for training and development of negotiators/mediators;
- proof that if negotiation is adopted:
  - — parties to negotiate are approved,
  - — ratification process is approved,
  - — negotiated agreements may be submitted by one or more parties to a board or agency and, if approved, become an order of the board or agency,
  - — approval powers are limited,
- subsidies for approved mediators
  - — code of ethics
  - — confidentiality

While this is what I think "should" happen, I am pragmatic enough to know that it is most unlikely to occur. Thus, as a *proposal*, I suggest negotiation became integrated with existing decisional processes. Where and how it is integrated will depend, in part, on the kinds of issues to be addressed through negotiation.

As a first step, perhaps the most that supporters of negotiation/mediation can expect is that this approach will be integrated into existing structures and processes and not simply ignored. The legislation and procedures are in place; the law requires that the parties comply with these processes — there is very little that can be done or perhaps should be done in the short term to circumvent requirements.

Thus, as a mechanism for resolving planning issues, negotiation/mediation will likely be an adjunct to planning processes and boards; as a technique for resolving assessment disputes, it will be an adjunct to assessment boards and panels; and as a way of putting policy into effect, it will be an adjunct to management and regulatory processes. In other words, negotiation/mediation is not likely to replace or supplement existing decision-making processes (although one could argue that it should), but rather to enhance those processes. On the other hand, as a technique of offering fast-track remedies to disputes that arise subsequent to an assessment or regulatory board decision, negotiation and mediation may very well stand alone, if for no other reason than that there are no structures into which they can be integrated.

COMMENTARY I

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INTRODUCTION

There is ongoing and sometimes acrimonious debate concerning the move towards a less formalized or institutionalized process of environmental dispute resolution. This paper concentrates on what I consider to be the heart of the question concerning the future of negotiation/mediation in the context of existing assessment and approval processes; that is: Where does negotiation and mediation fit? The discussion of the issues is confined for the most part to the situation as it presently exists in Ontario, which relies largely on the adversarial approach underlying a quasi-judicial administrative hearing process.

Although not all will agree that the existing approval and regulatory regimes are appropriate, we are nevertheless forced to deal with the "here and now." In my opinion, it is not constructive to spend a great deal of time hypothesizing as to what would happen if negotiation and mediation existed as a separate process; in effect, as an alternative to the hearing process arising out of specific legislation such as the Environmental Assessment Act, the Environmental Protection Act, and the Ontario Water Resource Act.

This legislation, after years of lobbying and debate, is in place and in certain circumstances, public hearings are required. It is unlikely that the legislation will be scrapped and it therefore serves little purpose to propose or seriously discuss measures that will only avoid coming to grips with the question that is our primary concern at the practical level, i.e., how might we integrate the negotiation/mediation process into the existing approval and regulatory framework within which we must operate? Assuming that negotiation and mediation can serve some useful role, what should that role be and what are its limitations?

The Ontario experience with environmental mediation over the past two and a half years involved the Environmental Assessment Board (EAB) to some degree in the administrative aspects of the process. In a limited number of cases where it was determined that mediators would be helpful, the Board, at the request of the then Minister of the Environment, assumed through its chairman certain administrative responsibilities. These included the appointment of a mediator acceptable to the parties and the payment of the mediator's fees and disbursements out of the Board's budget.[1] Although the Board had some reservations at the outset as to its proper role in any mediation process, it nevertheless was prepared to continue providing administrative support for an initial trial period of approximately two years, after which time a thorough reassessment of its role would take place.

This reassessment did in fact take place in August 1986, shortly after I assumed the chairmanship of the EAB. After extensive review of the three matters involving mediation under the administration of the Board, as well as intensive discussions involving all Board members, the Board concluded unanimously that its role in the implementation of environmental mediation was inappropriate for a variety of reasons, some of which will be referred to later. It should be pointed out, however, that although the Board has formally withdrawn from becoming actively involved in the implementation of environmental mediation, it nevertheless continues to support the use of mediation/negotiation in appropriate cases as one tool for environmental dispute resolution.

This commentary begins with an examination of the very real limitations attributed to the process of negotiation/mediation, and my interpretation of its proper and productive role within existing assessment and approval processes. It concludes with some suggestions as to the type of modifications I see as necessary to the existing legislation in order to facilitate and maximize the positive aspects of mediation and negotiation in support of the existing adjudicative process.

Limitations of Negotiation/Mediation as a Form of Environmental Dispute Resolution

It is clear from the current literature that there is substantial agreement on the essential elements that must be present *before* an attempt at mediation should be seriously undertaken. Within a voluntary "consensual" framework, the criteria most commonly cited include the following (Cormick 1980, 1982; Goldbeck 1975; Susskind and Weinstein 1980; Jeffery 1984a, b; Shrybman 1984; Gibson and Savan 1986):

- *identification of parties:* the ability to identify and include in the process all relevant parties;

1 The EAB has been involved in only three attempts at mediating environmental disputes. They were the "North Simcoe Landfill," the "St. Vincent/Meaford Landfill" and a fact-finding exercise involving the "Halton Landfill." Only the North Simcoe mediation resulted in a mediated settlement that was not required to be put before the Board for ratification. The St. Vincent/Meaford mediation was unsuccessful and discontinued. Fact-finders determined that mediation was inappropriate with respect to the Halton landfill matter.

- *representation:* the representation of the parties by interest in order to reduce the number of individual participants to those who represent a "different" interest;
- *crystalization of issues:* unless the issues underlying a dispute have been sufficiently defined to the point where parties are both informed and prepared to adopt a negotiating position, any attempt at mediation may be premature and hence unproductive;
- *the incentive factor:* is there an incentive for particular parties to settle the dispute? This factor may vary according to the relative strengths and weaknesses of the various parties and their individual expectations; and
- *the implementation factor:* the ability of any mediated settlement to be implemented and, where subject to review by an adjudicative body, the likelihood that the agreement will be ratified.

Although the above list is by no means exhaustive, it does illustrate a number of wide-ranging factors that must be considered in order to know whether a particular dispute will be amenable to mediation. In my view, there will be an extremely limited number of cases in which the necessary criteria will be present. Thus, the viability of environmental mediation, both as a separate process or in conjunction with an adversarial process where a public hearing is mandated by legislation, will continue to remain of limited utility.

I do not view environmental mediation/negotiation as a substitute for the existing rights of parties and interested members of the public under existing legislation. This is the case whether or not a public hearing ensues, by reason that a mediated solution might not be the most environmentally acceptable or suitable and therefore may not be in the public interest.

It is possible for a mediation/negotiation process to add to or enhance existing rights afforded by legislation but any such process should not supercede those rights. Gibson and Savan (1986: 249) in their study of environmental assessment in Ontario concur:

> *Mediation opportunities should be offered only as a voluntary complement to the hearing process. If a settlement is not reached through mediation, the matter must revert to the Environmental Assessment Board. If an agreement is reached, it should still be ratified by the Board at a public hearing.*[2]

In addition, the authors of the above study recognize that mediated settlements are possible and useful only under certain conditions (clear issues, potential for compromise, ability of parties to participate effectively). These are now, at best, rarely met in environmental assessment cases reaching the hearing stage.[3]

Next, it is of some benefit to compare the relevant strengths and weaknesses of the negotiation/mediation process with those associated with the quasi-judicial adversarial hearing. This comparison is dealt with below under the headings of participation, representation, information gathering, inequality among parties, and public interest considerations.

Participation

I take issue with the suggestion that well-developed standing rules of adjudicative bodies inhibit participation, whereas the negotiation/mediation process may include an almost unlimited number of parties.

Standing rules may have some relevance in terms of both quasi-criminal prosecutions pursuant to environmental regulatory statutes and common-law civil causes of action founded upon, *inter alia*, private and public nuisance, riparian rights, negligence, or trespass, all of which relate to proceedings before courts. But there appears to be no statutory bar or obstacle prohibiting or even restricting the participation of intervenors before quasi-judicial administrative tribunals such as the Ontario Environmental Assessment Board or Joint Boards established under the Consolidated Hearings Act. This appears to be the case at least insofar as it can be demonstrated that the outcome of such proceedings can impact upon those who wish to participate.

Without getting bogged down in a detailed discussion of S.12(4) of Ontario's Environmental Assessment Act, let me state that the present practice of the Board would discourage the application of any rules of standing which would inhibit participation (see Andrew (1981) and Jeffery (1984b) for a detailed analysis of "standing" issues).

Moreover, even the courts have recently taken a more enlightened approach to matters of public concern. The Ontario Divisional Court, in a case brought by the Ontario Energy Board on the question of intervenor funding, granted leave to intervene as parties to all those who sought it, as well as permitting Energy Probe and the Canadian Environmental Law Association to intervene and be heard as friends of the Court (see Ontario Energy Board, 51 O.R. (2d) 333, p. 337).

Since negotiation/mediation must, by definition, be consensual in nature, there are many instances where it is simply not

2 Gibson and Savan (1986: 249) conclude that

mediation and other less formal means of conflict resolution among parties in environmental assessment cases are not replacements for hearing provisions. They should be a complementary counter balance to the regular adversarial approach ... but such mediation proceedings have no statutory base in the Environmental Assessment Act or elsewhere and the rights and obligations centred in the hearing process and decision making are needed to provide incentives for bargaining, means of implementing settlements, and a regular process for use when mediation is inappropriate or unsuccessful.

3 Gibson and Savan (1986: 247). It is not difficult to imagine situations where the opposition of local residents to the location of a proposed landfill site might be "overcome" by virtue of a mediated or negotiated settlement that includes appropriate monetary compensation or the purchase or expropriation of property. Although in such circumstances opposition to the proposed application might disappear, the proposed facility may nevertheless remain environmentally unacceptable from a technical or other perspective. It is precisely for these reasons that any negotiated settlement that otherwise would have been subjected to the hearing process should require ratification by the relevant tribunal to ensure that it is, in the opinion of an impartial tribunal, in accordance with the broader public interest. If in the judgement of the tribunal such is the case, the settlement will be ratified; if not, it will be rejected or suitably modified.

possible to obtain the participation of all parties likely to be impacted or affected. More often than not, an imposed decision will provide the only means of resolving a particular environmental dispute. With the necessity for tribunals to observe the rules of natural justice, charter requirements, and a host of statutory and procedural safeguards, even the intervenor who is unsuccessful in persuading the tribunal to decide in his/her favour is frequently more inclined to accept an adverse ruling if the proceedings are perceived to be fair and the intervenor has had "his/her day in court."

Negotiation/mediation does not, in my view, offer any more opportunity for participation than does an adversarial proceeding before an administrative tribunal; it is simply inaccurate and somewhat misleading to characterize it otherwise.

Representation

The likelihood of finding consensus among a large number of parties (the proponent, government agencies, the public at large, and various interest groups) places a particularly heavy burden upon the prospects for successful mediation in the context of environmental dispute resolution.

Contrary to mediation experience in the labour field, parties seldom have an ongoing relationship in environmental matters and are not compelled by legislation to appoint a representative capable of reaching binding agreements. The North Simcoe mediation attests to the difficulties encountered when individuals refuse to recognize the agreements arrived at by negotiators appointed to act on their behalf. Parties and participants before administrative tribunals, on the other hand, have the statutory right to participate either individually or in consort with others with similar interests at stake. Cost factors and funding criteria associated with the adversarial hearing process encourage group representation by interest where possible (see for example, the funding criteria established for the Consumers' Gas Liquid Natural Gas Application Order-in-Council No. 1199/86).

To be successful as a mechanism for dispute resolution, environmental mediation must overcome formidable obstacles to ensure the appropriate degree of "voluntary" participation by all interested parties. They must, by reason of their sheer numbers and diversity of interest, be prepared to entrust their individual concerns to an appointed representative or negotiator. Unfortunately, however, representational difficulties are often exacerbated by the very nature of the project for which approval is sought, (e.g., a toxic-waste landfill site or nuclear power station) giving rise to individual moral or societal concerns that preclude any real possibility of reaching a negotiated settlement.

Information Gathering

An area of concern, covering both the negotiation/mediation process and the adversarial hearing process, is the ability of parties involved to generate a sufficient information base upon which to establish effective participation. The ability or inability to do so in both cases depends upon a number of common factors, such as the availability of adequate funding, access to legal and technicial expertise, familiarity with the process itself, and knowledge of the rights and remedies afforded by both the process and applicable legislation. I would submit, however, that informational concerns are of signal importance to the negotiating process. Unless the issues in dispute have reached a stage of crystalization, at least to the point where the parties are knowledgeable enough about the issues to adopt a productive negotiating stance, the process will be doomed to failure.

It has been suggested that environmental mediation is appropriate for site selection exercises. I have serious doubts, however, as to whether it is possible to conduct meaningful negotiations in advance of a particular potential site having been chosen. Until site selection has occurred, it is difficult to ascertain who will be affected by the proposed undertaking, and either potential intervenors will be unwilling to participate if they are not to be directly impacted or they will participate for the express purpose of ensuring that the undertaking will be located elsewhere. In both cases, the issues generally will not have been sufficiently defined to the point where parties are willing to bargain in good faith.

Intervenors in adversarial proceedings who are inadequately informed about the proponent's proposal and the methodology and technology employed to justify it are likely to cause delay and ultimately increase the costs associated with the approval and regulatory process as they seek to use the process to acquire basic information to properly focus upon issues in dispute. The vast majority of those members of the public unrepresented by counsel at EAB hearings are there to learn more about the proposal before the Board, as opposed to wanting to put forward a firm position on the issues. Many of their concerns could be addressed by the use of adequate public information meetings or workshops in the pre-hearing stage, thus materially assisting in both scoping the issues and removing or at least reducing some areas of conflict at the hearing itself.[4]

Inequality Among Parties

It has become increasingly evident in recent years that the financial capabilities of participants to both the negotiating and hearing processes bears a direct relationship to whether participation in decision making will be judged "effective." In cases where a negotiated resolution of issues in dispute might appear possible, parties will be reluctant to embark upon such a course if they feel that they do not have the resources to participate effectively. The majority of large public and private sector undertakings subject to the provisions of regulatory legislation necessarily involve a plethora of data requiring both technical expertise to interpret as well as the skills of experienced counsel to present a party's position to a tribunal or, in the case of negotiation, to obtain maximum leverage at the bargaining table.

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4 The importance of pre-hearing consultation and public information meetings was the subject of comment by EAB panels in the past several months; see reasons for decision re: Smooth Rock Falls By-pass Application, EAB File No. EA-84-01, p.19 *et seq*; and Highway 69 By-pass Application, EAB File No. EA-85-01, p.23.

It is, in my view, naive to suggest that intervenors will not be forced to rely as heavily upon counsel and experts in negotiation/mediation as they do in an adversarial hearing process. Both processes will fail to realize their potential as dispute resolution mechanisms unless steps are taken to reduce the relative inequality among the parties involved.[5]

The advent of intervenor funding has significantly improved the potential effectiveness of intervenors involved in the adversarial hearing process and has had the additional benefit of materially assisting tribunals in reaching more informed decisions with both sides of issues being more fully canvassed at hearings. The debate has progressed beyond the question of whether intervenor funding is necessary and/or desirable as a means of encouraging effective public participation. It is now centered on determining the appropriate methods by which funding is to be administered.

As a supporter of intervenor funding in regulatory/approval proceedings, I am convinced that the provision of funding in appropriate cases and in a manner specifically designed to avoid abuse and ensure accountability will not only enhance the effectiveness of the hearing process, but more importantly, enable it to be seen as fairer, more relevant, and more accessible to the public.[6]

Public Interest Considerations

Perhaps no concept has sparked more consternation, debate, and general disagreement among those involved in environmental regulatory/approval processes than that of the "public interest." It is a term that appears incapable of precise definition yet is invariably used by decision makers as the principal rationale for the approval or denial of a particular application. Regulatory statutes often charge tribunals directly or by implication to take account of the public interest in the course of rendering a decision. Yet precious little guidance is provided or available to assist in the determination of precisely what constitutes the public interest.[7] The primary difficulty involves a lack of concensus over the limitations to be applied to the term "public" or "affected public."

An examination of the case law in Canada and the United States indicates that most courts are in favour of a flexible approach that will vary from situation to situation yet at the same time accommodate a variety of conflicting interests.[8]

The EAB most recently dealt with some aspects of this issue in relation to the Decom Medical Waste Systems Inc. application under the provisions of Part V of the Environmental Protection Act and generally conceded (EAB 1986: 29) that the term was "incapable of precise definition with any degree of specificity" and that, whatever public interest does mean,

> *it surely includes not only the interests of the public at large but also the interests, albeit sometimes conflicting, of the proponent, (customers of the proponent such as hospitals and the medical profession) as well as those persons in opposition to the proposed facility and it is the duty of the Board to balance these interests against the environmental risks associated with the proposed undertaking.*

It has been suggested that traditional planning, assessment, and regulatory processes tend to obscure and obfuscate the public interest rather than promote it. This has been attributed in part to the composition of decision-making bodies, the degree of competence of their members, and the reliance placed upon adjudicative and adversarial procedures. Proponents of this view argue that those harbouring suspicions of the negotiation/mediation process overlook the ability of people to solve their own problems in a manner acceptable to society at large.

As chairman of a quasi-judicial administrative tribunal, I acknowledge that my motivation in defending the adversarial adjudicative process may be suspect. I am nevertheless persuaded that an *open* public hearing format, wherein positions taken by all parties can be critically examined and tested using adversarial techniques developed over centuries of experience in relation to the judiciary, offers certain advantages over *private* negotiation/mediation as alternative methods of environmental dispute resolution.

My conclusions in this regard are based, in part, on the following considerations:

- Some believe that the mediation process functions effectively only when it is conducted in private, i.e., "out of the public eye." This, in my view, however, may place some serious constraints upon individual parties who are deprived of ascertaining the positions of other parties except through the appointed mediator. The parties are not afforded the opportunity of evaluating the relative strengths and weaknesses of other parties directly and are forced to rely heavily on the skills and integrity of the particular mediator.

  The recent Ontario experience has indicated that mediation can be time-consuming, expensive, and susceptable to

5 Although the EAB and Joint Boards have the power to retain experts to "assist the Board" in connection with any matter before it (Sections 18(9) and (10) of the Environmental Assessment Act and Consolidated Hearings Act respectively) and have done so in recent years, it is preferable for the hearing panel to avoid the appearance of being both advocate and decision maker; in this context, however, it should not be overlooked that regulatory tribunals, unlike civil law courts, have investigative as well as adjudicative functions.

6 See Orders and Reasons for Order of the Joint Board (chaired by this writer) in the Redhill Creek Expressway Application dated October 16th and November 5th, 1984. — Registrant's File CH-82-08; see also the statement of the present Minister of the Environment, Jim Bradley, in an address on environmental policies and initiatives to the Sierra Club Annual Meeting (November 1985); and Jeffery (1986:371).

7 Examples include: S.38(2)(e) of the Environmental Protection Act, RSO 1980 c. 141; the Ontario Energy Board has considered the "public interest" in connection with its mandate under the Ontario Energy Board Act. See S.49(3).

8 See for example the following: City of Portage La Prairie and Inter-City Gas Utilities Ltd. (1970) 12 D.L.R. (3d) 388; Re: Loiselle and Town of Red Deer (1907) 7 W.L.R. 42; State V. Crockett, 86 Okl. 124; Re: Mississippi River Fuel Corporation; (1946 65 PUR (N.S.) 184; Memorial Gardens Association Ltd. V. Colwood Cemetery Co., *et al* (1958) S.R.R. 353; see also the recent case of City of Calgary V. Public Health Advisory and Appeal Board *et al*; Genetar Corporation V. Public Health Advisory and Appeal Board *et al*, 1 C.E.L.R. 62 dealing with the question of need as it relates to the public interest.

criticism where the process is not conducted in an open manner designed to ensure some measure of accountability.

- Negotiation/mediation does not allow for a rigorous critical evaluation of the technical aspects of a complex undertaking within an accepted framework of rules and procedures developed for this purpose. If legal counsel and technical expertise are required to assist the parties in their understanding of the issues and presentation of their negotiating position in the context of mediation, then many of the cost benefits attributed to this process will be negated.

- If, as required by existing legislation, a public review of any negotiated settlement is still necessary, the ultimate decision-making body will interpret the "public interest" in much the same fashion as it would otherwise, and there may well be a duplication of effort in this regard.

- At present, there is no administrative framework within which to properly administer, supervise, and train potential mediators. Without an institutionalized framework, independent of both the tribunals themselves and interested parties, the integrity of any review hearing process will be jeopardized.

- Unless the negotiation/mediation process includes all of the interested parties constituting the public interest in the broad sense of the term, the mediated solution might not be the most environmentally acceptable or suitable.

- It has been suggested that the adversarial system may encourage legal counsel to drag out the hearing process and, in the course of doing so, extract larger fees from their clients. The same criticism, if valid, can be applied to mediators, for they too have a vested interest in a prolonged process. The potential for abuse in the hearing process is, in my view, significantly reduced from that of the negotiation/mediation process, which at the present time lacks guidelines and a mediator's code of ethics. The conduct of counsel is a matter of public record and subject to the strict control of the tribunal hearing the matter. In many cases, the tribunal has the power to award costs and, in addition, the party dissatisfied with the fees charged by its counsel may have them taxed before the courts.

- Proceedings before quasi-judicial administrative tribunals are subject to rules of natural justice and procedural fairness and alleged breaches thereof may be reviewed by the courts. Although the same procedural safeguards may apply to a tribunal's review of a mediated settlement, the degree to which procedural fairness applies during the negotiation/mediation process itself is far from settled.

Perhaps the most serious impediment to the negotiation/mediation process today relates to the degree to which the process may be integrated with provisions of existing approval and regulatory legislation and the applicable tribunal's statutory obligations under the legislation.

There is no authority for a tribunal to dispense with any statutory requirements of legislation simply because the parties have reached a mediated settlement; and indeed members of the public disclaiming such settlement may have the right to address the same issues which were the subject of mediation at a subsequent public hearing mandated by the legislation. Additional problems arise if, for example, all of the requirements of Section 5 (3) of the Environmental Assessment Act with respect to an undertaking subject to that Act are not addressed in the course of mediation.[9] In other words, it is not an either/or situation. Unless an exemption from the Minister of the Environment has been granted, the legislation still must apply and in certain circumstances a public hearing must take place. (See Section 12 (2) of the Environmental Assessment Act.)

If one accepts the contention that negotiation/mediation should not be allowed to replace the regulatory/approval process set out in existing legislation, where then does the future of environmental mediation lie?

Suggested Role for Negotiation/Mediation

It is my view that the proper role for negotiation/mediation in terms of environment dispute resolution lies in the area of pre-hearing consultation directed primarily at the scoping of and/or settling of issues in dispute. Provided the criteria necessary to undertake mediation are present and the parties are willing, a mediation process may assist in narrowing the issues that must be dealt with at a public hearing. Agreed positions may be documented in the form of "Minutes of Agreement" to be presented to a hearing panel for ratification.

For reasons expressed above, it is unlikely that all issues in dispute will be resolved by mediation and any unresolved issues will be dealt with in the usual way in the hearing process.

Issues that are not in dispute should be presented with supporting evidence to the hearing panel in a summary fashion and, subject to the directions of the tribunal, this will, in most cases, obviate the need for extensive cross-examination.

The same summary procedures could be used during the hearing itself in instances where the parties have found grounds upon which to reach agreement with respect to issues arising at the hearing. Again, subject to instructions from the hearing panel, only a minimal amount of evidence would likely be required in support thereof.

Even if all issues are the subject of agreement among the parties, any negotiated settlement should nevertheless be reviewed by the appropriate adjudicative body required by legislation to hear the matter.

Several panels of both the EAB and Joint Board in the past few months have recognized and, in some cases, commented upon the need for appropriate pre-hearing consultation and scoping mechanisms to be established in order to narrow the number of contentious issues in dispute and thus more effectively utilize the public hearing process for the purpose of

9 Section 5 (3) of the Environmental Assessment Act sets out the statutory criteria that must be included in an environmental assessment.

resolving the remaining issues.[10] Negotiation/mediation has a useful role to play in attempting to find common ground among parties with diverse interests preparing for an open public hearing, based upon the adversarial investigative model and sanctioned by existing legislation.

It would, in my opinion, be appropriate to amend the regulatory/approval legislation to provide for a process to explore and encourage agreement by parties on the scope of both the environmental assessment itself and the issues to be addressed at the hearing, subject at all times to acceptance by the hearing panel of any agreed-upon limitations. In this fashion, formal recognition might be given to a process that presently is completely extraneous to both the hearing process and applicable legislation.

Negotiation/mediation, in my view, should not exist as a separate process. Given the exceedingly complex and far-reaching effects of the majority of projects subject to existing legislation, I am somewhat sceptical that these projects could be successfully mediated in any event.

If the hearing process is to remain as the principal model for environmental dispute resolution, as suggested, I believe that we should concentrate our efforts on developing appropriate institutional structures designed to encourage a more productive, open, fiscally responsible, and accountable use of the negotiation/mediation process. If this, in fact, occurs, then negotiation/mediation's role as a useful tool in environmental dispute resolution will indeed be greatly enhanced.

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10 See footnote 4, above

Critique II

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Le texte de Paul Emond est plus qu'une simple opinion. C'est un véritable traité sur la médiation en environnement. Avant de faire quelques commentaires, j'aimerais expliquer rapidement le contexte québecois.

Au Québec, la procédure d'évaluation et d'examen des impacts est définie par un règlement précisant les types de projets qui doivent être soumis à la procédure. Le promoteur doit faire parvenir au ministre un avis de projet. Il reçoit une directive d'étude d'impact. Une fois l'étude réalisée et que le ministère de l'Environnement est satisfait, le dossier est confié au Bureau d'audiences publiques sur l'environnement pour un mandat d'information de 45 jours. Pendant ce temps, les groupes ou individus peuvent demander au ministre la tenue d'une audience publique. Le ministre ne peut refuser la demande que s'il la juge non fondée. La durée du mandat d'audience est de quatre mois. La commission formée par le Bureau d'audiences publiques a un simple pouvoir de recommandation. La décision finale est prise par le Conseil des ministres sur recommandation du ministre de l'Environnement.

Depuis sa création en 1979, le Bureau a tenu une vingtaine d'audiences publiques. Il s'agit d'une procédure quasi-judiciaire, mais le contexte de l'audience n'a jamais été légiféré. Il n'y a ni contre-interrogatoire, ni assermentation.

Depuis 1979, aucun dossier soumis à la procédure d'évaluation et d'examen des impacts n'a fait l'objet d'une contestation devant les tribunaux, sauf un dossier actuellement en audience : la construction par Hydro-Québec d'une ligne de transport d'énergie électrique à $50 kV Radisson-Nicolet-Des-Cantons. Les opposants ont intenté un procès contre le Gouvernement et Hydro-Québec en contestant la légalité constitutionnelle de la vente d'énergie électrique aux États-Unis ainsi que la légalité face à la Loi sur la qualité de l'environnement d'une décision du Conseil des ministres fixant le corridor préférentiel pour le passage de la future ligne avant la tenue de l'audience publique.

Dans notre contexte, l'audience publique est un événement politique important. Le mandat est large, l'analyse approfondie. Il n'y a audience que lorsqu'il y a conflit et les commissaires scrutent particulièrement la justification du projet et l'option de moindre impact. De ce fait, l'audience acquiert un caractère symbolique déterminant. Notre procédure a de grands avantages et de grandes failles qui ont fait l'objet d'une brève étude intitulée *Le Bureau d'audiences publiques sur l'environnement et la gestion des conflits : Bilan et perspectives*.

À cause du caractère dur et parfois assez radical de l'audience, il est indispensable de chercher d'autres voies de solution des conflits en environnement. C'est dans ce contexte que le Bureau a tenté quelques expériences dans le cadre d'enquêtes publiques. Il s'agissait de projets soumis à la procédure d'évaluation et d'examen des impacts, où des requérants avaient demandé la tenue de l'audience mais où ils ont consenti d'explorer certaines solutions par la voie de la négociation. Ces expériences ont été trop modestes et trop limitées pour qu'on puisse en tirer des conclusions générales. Mais nous entrevoyons des possibilités nouvelles.

Comme beaucoup d'autres, nous sommes d'avis qu'il y a lieu d'explorer plusieurs voies de négociations afin de rendre les conflits environnementaux plus productifs. Nous pensons que l'audience publique est souvent nécessaire pour faire apparaître les divergences au plan des options, des valeurs, des filières techniques. En suscitant un débat social, l'audience fait évoluer les valeurs sociales. Il est par ailleurs évident qu'on ne peut faire un débat social à propos de chaque projet. J'ai particulièrement aimé ce que Monsieur Emond dit sur l'information, l'expertise et les ressources accordées aux groupes dans le cadre de la médiation ainsi que le danger ou la stérilité d'approches juridiques. Dans notre milieu, le développement de la médiation environnementale, tant pour les projets soumis à la procédure d'évaluation et d'examen des impacts que pour les autres projets, supposera des ajustements nombreux.

Dans le cadre de la procédure d'évaluation et d'examen des impacts, et je parle principalement de celle du Québec puisque c'est la seule que je connaisse à fond, il faut notamment rendre l'information accessible au public beaucoup plus tôt dans la préparation du dossier, permettre des consultations à différentes étapes, exiger du promoteur que son étude d'impact soit complétée avant que la négociation ne commence. Il faut aussi donner des moyens techniques et financiers plus importants aux groupes d'intérêt. Il faudra probablement aussi mieux définir les parties en cause, ou trouver des méthodes efficaces pour les identifier. Un processus de médiation peut-il être limité dans le temps? Actuellement, nos mandats d'audience sont de quatre mois et cela limite dangereusement la validité du processus, le promoteur ayant tendance à tarder dans ses réponses aux questions de sorte que la Commission ne parvient pas à fermer le dossier en temps et lieux. Dans le cas de la médiation environnementale, il me paraît indispensable que toute l'information soit close et que le promoteur se rallie à une solution négociée. Il faut également s'assurer que le Gouvernement se lie à l'entente et en respecte tous les aspects. J'ai particulièrement aimé les remarques de Monsieur Emond sur le rôle des ministères.

En bref, les propos de Monsieur Emond me semblent offrir des voies nouvelles et stimulantes pour la résolution des conflits en environnement. Je ne pense pas que la médiation puisse toujours remplacer l'audience. Mais elle est certainement un moyen très utile.

RESPONSIBILITY, ACCOUNTABILITY AND LIABILITY IN THE CONDUCT OF ENVIRONMENTAL NEGOTIATIONS

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This paper examines negotiation-based approaches to existing procedures for environmental assessment in Canada. Like the United States, Canada is seeking less adversarial and more collaborative forms of environmental dispute resolution. But can informal negotiation mechanisms be used to supplement existing environmental impact assessment procedures? We think they can be—at little cost and with substantial benefit.

We believe that informal face-to-face negotiations can be used to augment most formal decision-making procedures and that the product of these informal negotiations will be viewed as beneficial by government, industry, and citizen leaders. Our experience in the United States is that an informal consensus-building step, typically lasting four to six months, constitutes the only time "lost" by negotiations. These short-term delays are more than offset by the long-term gains that accompany improved working relationships and the avoidance of litigation.

To illustrate exactly what we mean, it might be useful to describe the negotiated rule-making procedures recently initiated by the U.S. Environmental Protection Agency (EPA). This process incorporates an informal consensus-building step in the formal regulatory procedures required by the federal Administrative Procedure Act.

NEGOTIATED RULE-MAKING

During the early 1980s, EPA found that 80% of all its new regulations were being challenged in court. In an effort to avoid the costs and delay associated with constant litigation, EPA initiated a demonstration project to test the usefulness of negotiated rule-making. Since then, four new EPA rules have been successfully developed using this process. Currently, two additional demonstrations are underway at EPA and several other federal agencies, including the Federal Trade Commission and the Department of Interior, are experimenting with the same process.

EPA initiated the Regulatory Negotiation Project in February 1983. It was designed to:

- test the usefulness of negotiation as part of the regulation development process,
- identify the kinds of regulations that are best suited for negotiation rule-making, and
- identify the procedures that are most effective in promoting negotiations among parties with different interests.

The traditional government rule-making process is very formal, with no opportunity for the parties to share information or to explore new ideas or common interests. Traditional notice-and-comment rule-making often leads to adversarial interactions among affected parties. Public comments focus on problems or weaknesses rather than creative solutions. Parties have no means to resolve a situation even if they want to, since the agency is forbidden to meet privately with concerned groups once the formal rule-making process begins.

EPA does not see informal negotiation as a substitute for the formal conventional rule-making process: indeed, federal law would not permit this. Instead, negotiation is viewed as a supplement through which the key parties participate voluntarily in the early development of a proposed regulation. The draft negotiation is then published in the *Federal Register* and proceeds through the normal review and public comment process.

In each demonstration, negotiations were managed by a neutral mediator who helped to identify the appropriate participants, build an agenda of issues to be resolved, and facilitate the meetings. All of EPA's demonstrations have resulted in agreements on proposed rules. In each instance, the draft rules have been promulgated without dissent. The cost of the services of the mediator has averaged $50,000 (U.S.). These costs could run as high as a $100,000 depending upon the complexity of the rule and the number of parties involved.

IDENTIFYING THE RELEVANT PARTIES

One argument often made against wide-scale participation in *ad hoc* dispute resolution procedures is that the appropriate participants are difficult to identify and that it is even more difficult to sustain productive dialogue among large numbers of people. In the negotiated rule-making process, the number of participants tends to be between 20 and 25. EPA uses an

outside convener to identify relevant organizations and groups. These organizations are then invited to designate individuals to represent their interests in the negotiations. The key to success has been in shifting the focus from the number of participants who ought to be involved to the number of interests that need to be represented.

Before the negotiations begin, the convener helps the parties agree on protocols or ground-rules under which negotiations will be conducted. In the negotiated rule-making demonstrations, these protocols have tended to address issues of representation, guarantees about the openness of the process, and procedures for accommodating parties who wish to enter or leave once the proceedings have begun. Usually, EPA has provided a one-day training program on the techniques of negotiation for all participants in the rule-making.

RESPONSIBILITY

In informal negotiations, we need to look at responsibility from three perspectives: first, the responsibility of the parties to represent their constituents; second, the responsibility of the public agency sponsoring the negotiation process; and third, the responsibility of the mediator to the parties.

Representing a diverse and loosely knit organization can be extremely difficult. To a large extent, parties represent their own interests and values and hope that those values are reasonably similar to those held by other members of the organization. Parties can express an opinion or even accept a proposal at the negotiation table but they must make it clear that they need to check with their consituency to confirm their position. "Checking" often elicits diverse responses. The representative must synthesize this information and represent it as accurately as possible at the negotiation table.

Some groups are more tightly organized than others. The group representatives may have a Board of Directors with whom to check. Otherwise, they may have to resort to letters informing their constituents of the issues and the alternatives being considered, stating a recommended course of action and soliciting opinions. It is essential that the organization understand that at some point their representative will have to make a commitment on their behalf that is morally binding on the entire group. The other parties to the negotiation must understand that even though the group's representative makes a commitment on behalf of the group, individual members of the group may exercise their right to dissent.

Public agencies that sponsor informal negotiations are responsible for meeting the letter of the law with regard to their administrative obligations. *Ad hoc* consensus building is not a substitute for following prescribed steps for agency decision making. Public agency representatives are responsible for reminding participants that any agreements reached must go through the formal agency decision-making procedures perhaps change during the process. The outcome will be determined by the agency's interpretation of the public interest.

In the EPA negotiated rule-making process, the agency is a member of the committee and makes a commitment to the group to use any consensus-based recommendations from the negotiation process as part of the formal rule-making. The agency's responsibility during the formal rule-making process is to take into consideration comments by other parties and then to promulgate a final rule.

The mediator is responsible to the parties in the negotiation process. Any potential conflict that the mediator may have must be disclosed to the parties at the beginning of the process. He or she must work within the contractual framework that is spelled out at the beginning of the process. If at any time during the course of the negotiations the mediator appears to favor a particular party or outcome to the point that his or her neutrality is jeopardized, it is the responsibility of the mediator to volunteer to withdraw.

In addition, the mediator has a responsibility to be certain that the interests of groups not actually at the table are taken into account. This does not mean that the mediator "represents" them. It does mean, however, that the mediator raises questions for the participants aimed at ensuring that they take into account all possible interests and concerns.

ACCOUNTABILITY

In any kind of environmental impact assessment or rule-making process, the government remains accountable as long as it has the authority and the responsibility for making the final decision. If there is a problem, it is that bureaucrats are reluctant to participate in pre-rulemaking negotiations because they feel that they will have to give up their accountability to the group. It has to be made clear that this process is for the resolution of differences among the parties. The recommendations of the group are usually advisory. The responsibility of the decision maker is to take into account these recommendations during formal decision-making procedures.

Participants in the negotiation process are accountable to each other. The goal of the process is to encourage information sharing and joint fact-finding. The desired outcome is the best joint recommendations that the participants can come up with. If they do not negotiate in good faith (e.g., share information, reveal their underlying interests, do what they promise to do, etc.), the process will fail. Participants are also accountable to the organizations they represent.

The mediator is accountable to the participants and to the community at large for doing the best job he or she can. This involves, in our view, the need for a contract that spells out exactly what the mediator will and will not do. It is not the responsibility of the mediator to provide assurance that all parties come to the table with equal power; it is very rare indeed that this will happen. There may be techniques that the mediator can use to help the balance of power but, ultimately, each participant's power lies in his or her willingness to participate in the group consensus and his ability to commit his interest. In the Negotiated Rulemaking Project, EPA has provided a resource pool where funds are available to a party or parties to research critical questions or to hire a consultant

or technical expert to assist them in interpreting data for resolving specific issues.

LIABILITY

The parties to an informal consensus-building process are not contractually liable for what they say or do in a negotiation process. This is one of the real values of using this process to supplement the formal decision-making process. The commitments are morally binding and it is assumed that they will be kept. Often, these commitments become binding when they are incorporated in the agency decision at the end of the formal decision-making process.

It is difficult to identify any risk of liability to the mediator. He or she is the process manager; the agreement belongs to the parties. It is possible that the mediator could be sued for breach of contract if a contract existed. However, in most negotiations, the mediator's contract simply states that he/she serves at the will of the parties.

Public officials who are responsible for making the final decision are usually represented by staff during the informal negotiation process. We do not believe that these officials can be held liable for comments or commitments made by their representatives during this process. Draft agreements are reviewed by the agency to ascertain that they are consistent with agency policy and authority.

Agreeing to participate in a negotiation process is not the same as agreeing to any outcome. No one is liable for an implied commitment to a consensus once the process begins.

In fact, a variety of safeguards can protect the parties in consensus-based negotiations. These include, for example, protocols or rules of operation that are adopted by all of the parties; and the recognition on the part of the other participants that, if the rights and interests of any one individual are violated, the negotiations will be terminated and/or the agreement will not be implemented. As well, the mediator looks out for the rights and interests of the participants by asking them if they are aware of all of the implications of an agreed-upon course of action. Have they considered this issue? Can they or their group live with this outcome? Will this agreement violate the rights or interests of any of the parties who are at the table or of any of the interests who are not represented at the table?

SUGGESTIONS REGARDING NEGOTIATED APPROACHES

We would like to make some recommendations based on the EPA demonstrations for integrating an informal negotiation process with the formal public-agency decision-making process.

Separate Convening From Mediating

It is important to separate the convening function from the mediation function. The responsibility of the convener is to identify the potential parties for the negotiations, build trust in the process and identify the major issues that need to be resolved in order to reach a consensus-based agreement. This job requires quite different skills from those required in facilitation or mediation. In fact, it may be desirable for the parties to select the mediator at the conclusion of the convening process.

Start With Joint Fact-Finding

Joint fact-finding and joint learning are essential to consensus-based agreements. At the beginning of the negotiation process, the participants have different levels of understanding and knowledge about the issues. Joint fact-finding can provide a common database on which to establish future judgements. Participants might jointly hire an outside expert to advise them on a particularly difficult issue or jointly visit a facility or site to observe potential impacts on the environment.

Use a Mediation Team

We recommend a team approach to mediation. The mediation team might be made up of the mediator, a technical consultant knowledgeable about the issues to be negotiated and a support person who is responsible for preparing minutes of meetings and meeting notices, making room arrangements, and maintaining communications with the participants between meetings. Through the team approach, the mediator can focus on the parties and on procedures to resolve their differences.

Try a Demonstration Project

We recommend that a few well-documented demonstrations of this process be attempted before adopting informal dispute resolution procedures as part of a formal decision-making process. An independent monitor should be retained to document the process both during negotiations and after they have been concluded. By surveying the parties concerning their expectations and feelings about the negotiation process, the monitor can provide direction for future demonstrations.

Begin Before an Impasse Develops

Do not wait until the parties are at an impasse to initiate a voluntary negotiation process. We believe that it is better to get the parties together before disagreements occur rather than after they have established adversarial positions.

Provide Negotiation Training

We recommend that training in the techniques of negotiation be included as part of any effort to bring groups together for informal negotiations. For many, this is a new experience. Training in negotiation will help equalize the level of skills of participants where some of the parties may be experienced negotiators. When the participants negotiate skillfully, a better agreement is reached.

CONCLUSION

We believe that negotiation-based approaches are extremely desirable as part of the process of government decision making. Some sort of informal negotiation process could prove to be useful as a supplement to the Canadian EIA procedures. A more thorough examination of the negotiated rule-making process underway in the United States may be instructive. Issues relating to responsibility, accountability, and liability have not proven to be obstacles to success.

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COMMENTARY I

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McGlennon and Susskind recommend "seeking less adversarial and more collaborative forms of environmental dispute resolution." They explore how informal negotiation processes can be used to supplement more formal procedures, and provide specific suggestions for linking the two. They suggest that a few "well-documented demonstrations of this process be attempted before adopting informal dispute resolution procedure as part of a formal decision-making process."

The Alberta Energy Resources Conservation Board (ERCB) is a regulatory agency that adjudicates environmental issues as they relate to energy developments. The Board has found that the formal adjudication process is adversarial and not an effective means of resolving conflicts between a developer and people residing in the area of a proposed project. Consequently, it has explored and experimented with informal negotiation processes to supplement the formal system. One of these experiments is similar to the negotiated rule-making discussed by McGlennon and Susskind and has served as a kind of "demonstration project" for resource regulation in Alberta.

Since I agree with most of the views expressed by McGlennon and Susskind, a description of the rule-making experiment may be an appropriate way to extend the discussion of their paper.

Some background information is necessary in order to understand the experiment. Alberta has a standard or guideline that specifies the percentage of hydrogen sulphide in raw gas that must be recovered as elemental sulphur when the gas is processed. All of the hydrogen sulphide must be removed, but that portion that is not converted to elemental sulphur is incinerated and discharged into the atmosphere as sulphur dioxide.

Gas containing hydrogen sulphide is commonly referred to as sour gas and is both a valuable resource and a source of controversy between environmental groups and the industry. Environmental groups contend that only that portion of sulphur dioxide that cannot be recovered can be discharged, while the industry holds that discharge limits should have regard for considerations such as cost.

Almost one-third of the gas produced in Alberta contains some hydrogen sulphide and, therefore, must be processed. The concentration of hydrogen sulphide in gas varies from less than 1% to as much as 90%. Recovery of hydrogen sulphide as elemental sulphur is economic when the volumes are large, but when the amount of raw gas being processed is small, or when an attempt is made to recover the last fraction of it, the costs exceed revenues and the operation becomes uneconomic. Balanced against these economic considerations are the environmental impacts of sulphur dioxide emissions. Alberta air quality standards ensure that emissions are kept to a level that will not negatively affect people living near sour gas plants; but sulphur dioxide discharged to the atmosphere has a global impact.

In 1971 Alberta issued its first guidelines for the recovery of sulphur at gas processing plants. They were developed by the ERCB and Alberta Environment. The guidelines were tough and required industry to invest substantial sums to retrofit processing plants in order to recover additional sulphur, which, of course, resulted in lower emissions of sulphur dioxide. In 1979 the ERCB and Alberta Environment initiated a new review of sulphur recovery, but this time sought comments from industry and from Environment Canada. In 1980 more stringent revised guidelines were issued.

The current controversy over the suitability of the guidelines developed during the early 1980s. Environmental groups criticized the guidelines on the grounds that they had not had an opportunity to have input during their creation. The ERCB and Alberta Environment agreed that the next review of the guidelines would provide for that input.

By 1985 it was apparent that the guidelines should be reconsidered. The Alberta performance record had been very good: average recovery of sulphur was about 98% — very close to the maximum that might be achieved if no regard was given to economic considerations. However, in the intervening years there had been a major growth in very small processing plants, which had became a source of concern in rural areas. Although emissions at these plants averaged less than one tonne per day, this amount appeared excessive to people living around the plants. Moreover, new technology was being developed that appeared to be applicable to small plants at more favourable costs than previously estimated. The ERCB and Alberta Environment decided to initiate a new review of the guidelines.

Discussions were held with both industry and environmental groups to ensure their participation. The ERCB and Alberta Environment wanted to encourage a co-operative rather than a divisive atmosphere and concluded that they should provide:

- a technical review of the guidelines;
- technical assistance to the environmental and public interest groups so that they would be on equal terms with industry and government;

- a process that encouraged discussion and co-operation; but
- a decision-making process available if the parties could not agree.

The following plan was agreed to by all parties:

- A technical task force of the ERCB and Alberta Environment would make a review of the 1980 guidelines to test their appropriateness in the light of current technology and economics.
- The task force report would be reviewed by a committee with representatives from industry, the general public, environmental groups, Alberta Environment, and the ERCB.
- The public and environmental representatives would be assisted by independent technical experts funded by the ERCB.
- It was hoped that the committee would arrive at a consensus position that they would report to the Chairman of the ERCB and the Minister of the Environment, who would accept their conclusion.
- If the parties could not agree, a mini-hearing would be held by the Chairman of the ERCB and the Deputy Minister of Environment. After listening to all the parties, the Chairman and Deputy Minister would make a decision.

It is too early to know whether this process will be successful. However, it appears to be an example of the kind of collaborative process that McGlennon and Susskind suggest.

COMMENTARY II

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It is always difficult to comment on hypothetical processes, especially when much of the evidence comes from other (i.e., provincial or U.S.) jurisdictions. Moreover, I believe unequivocally that negotiation is the wrong place to start when planning a new public process of environmental impact assessment. Indeed, negotiation only has a role once traditional adversarial processes are operating openly and regularly, a status that they have not yet achieved anywhere in Canada. Even in Ontario, relatively few public hearings have been held, intervenor funding is in its infancy, few people have respect for the process (most of those who do are in environmental groups), and the government's enforcement of Environmental Assessment Board decisions remains to be tested.

On the other hand, negotiation can be successful if applied in the right way. Later I will refer to a document prepared by a multi-stakeholder task force. First let me make some general comments.

If trust is lacking, negotiation is likely to exacerbate a situation. Canadians today do not trust government, and government-sponsored negotiation will raise distrust and anger that can be heard more effectively in the quasi-judicial hearing than in the negotiating chamber. Even those who get too close to government, as I did in Paul Emond's (1986) soft-drink container negotiations run a serious risk of losing the trust of colleagues. I recently served on a multi-stakeholder consultation task force on federal state-of-the-environment reporting. Despite the fact that Environment Canada was represented at the table on an equal basis with other stakeholders, it virtually ignored the task force's recommendations. See if I waste my time trying to be helpful to them again!

Our language must change. If Pollution Probe's toxic-chemical landfill excavation plans were couched in the aggressive technological language used by Atomic Energy of Canada, Ltd. (AECL) when it seeks a secure storage location for wastes, we would meet the same aggressive public opposition. Words are terribly important. It is disappointing to see that even the workshop background paper continually refers to "environmental disputes." There is no such thing as an environmental dispute: there may be scientific disputes (will the abatement strategies work?), economic disputes (who will pay to clean up the spill?) or philosophical disputes (will human beings evolve to become resistant to toxic chemicals?) Most disputes contain components of all of these, but that does not make them environmental disputes. When did you last hear someone argue that the environment *should* be destroyed?

Perhaps more important, why focus on disputes? We should be talking about environmental *planning*. We should be planning for the environment *and* the economy, the environment *and* society, the environment *and* the future. Schools involve parents in the planning of their children's education; municipalities involve citizens in the planning of communities; the finance minister meets with lobby groups to assist him in planning the budget. Let's start involving stakeholders in planning for the improvement and protection of the environment: let's leave the word "dispute" for science, economics, law, and philosophy.

We must not forget that the Canadian legal system is completely different from the American legal system; the Canadian parliamentary system of democracy bears almost no resemblance to the American system of government; and Canadian society is significantly different from American society. Pollution Probe's involvement in U.S. environmental law cases has brought that home to me in a dramatic way. Even our Prime Minister, who approached the Americans as if they were Canadians on the acid rain issue, among others, seems now to be learning that American decision makers tend to be much more aggressive, much more competitive, and much more direct than Canadian decision makers. This is not to pass judgement one way or the other, although I find it easier to fight Hooker Chemical in a U.S. court than to fight Ontario Hydro in the rabbit-warren corridors of power. Nevertheless, while the approach to environmental negotiation in the United States is undoubtedly interesting to study, we should have a "Made in Canada" approach to environmental planning.

A made-in-Canada model, of which I am particularly proud, is the consultation development process initiated by Environment Canada in collaboration with the Niagara Institute. Four reports were prepared and considered by representatives of a broad range of stakeholder groups under the theme "Environment and the Economy." Over 40 people from business, labour, environmental groups, government and others met in plenary sessions and workshops and produced a joint statement, *The Environment, the Economy, and Consultation*, as well as three task-force reports and two on-going consultation processes. The report *From Cradle to Grave* from Environment Canada is one of these. Let me refer especially to the Niagara Institute Task Force report "Principles and Protocol of Meaningful Consultation on Environment-Economy Issues." The following is the "Definitions" section of that report:

> *Meaningful consultation is an ongoing dialogue among affected stakeholders, including government, aimed at obtaining all the relevant information, evaluating the available*

options and their related consequences, and providing an objectively balanced perspective to each stakeholder's decision making. A prime objective is to obtain consensus at each stage of the process.

Stakeholders are those groups who have a vital interest in the issue, will be directly affected by the outcome, and/or make an important contribution to its resolution.

Meaningful consultation is not a simple matter of bringing a diverse group of interested parties together and expecting them to immediately and automatically develop solutions to complex issues. There has to be time for the participants to get to know each other, to listen and understand respective positions, and to develop respect which can grow into trust in that particular environment. Finding the common ground of consensus and building on that commonality to reach a solution requires time.

It can be demonstrated that programs for which appropriate time was not allowed for in the developmental stage to seek consensus and test solutions, have suffered inordinately in the implementation stage. It is our contention that the time spent on a project in the developmental stage will materially reduce the time, costs, hassles, delays and disagreements at the implementation stages.

Good consultation relationships built up over time also support more rapid and effective co-operative responses to urgent situations such as environmental accidents.

Consultations may arise from or be an alternative to confrontation among stakeholders. In either case, the right kind of consultation can help ensure that the issues are appropriately defined, that constructive conflict-resolution techniques are adopted, and that solutions are developed which are relevant to the interests of all stakeholders.

The report has far wider applications than its title suggests. I would strongly urge that it be read, bearing in mind that it is a consensus document from a facilitated consultation. The document demonstrates how much agreement about the environment exists in our society.

As a representative of an environmental group, I cannot leave this topic without talking about money. Unlike the United States, where a strong tradition of giving to environmental causes exists, environmental groups in Canada have no money. Intervenor funding is essential in any process, whether negotiation or litigation. It is even more important to find ways to enable our environmental movement to become more professional, more secure, and more able to conduct independent research when necessary. Volunteers with no financial backing cannot be expected to sit in complex negotiations with anybody; paid staff who are mostly concerned with fundraising will not be able to give proper attention to the problems that need to be solved. The cheapest and easiest way to deal with an environmental issue is to go screaming to the press. It works! I would even go so far as to say that screaming to the press is the most successful way of getting action on environmental problems. For *starving* environmentalists, it is also the only way. In the world of environmental planning, just as in the jungle, the more hungry the players the more vicious the attack.

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SYNOPSIS OF WORKSHOP DISCUSSIONS

Audrey Armour and Barry Sadler

The synthesis that follows attempts to summarize the main themes of discussion at the workshop. It is organized chronologically according to the subject areas established for round-table discussion. For the record, we have attempted to consolidate, rather than just itemize, the substance of what was said. Much of the discussion at the workshop was cross-linked.

THEME I: ORGANIZING PERSPECTIVES ON ENVIRONMENTAL NEGOTIATION

Opening Statement. A key introductory point made by Dorcey was that negotiation has always been an element of environmental dispute settlement in Canada. This approach comprises a distinct mode of decision making, which may be distinguished from more traditional authoritarian and consultative aproaches. A typology of negotiation-based approaches was used to focus on the range of Canadian experience in this area. It underlines the minor role occupied by third-party mediation; and the sparsity of empirical research on environmental negotiation. Much discussion of its potentials and problems in relation to decision making is anecdotal or relies on U.S. experience. Further insight from American case material requires the development of comparative frameworks that incorporate the differences between the political cultures of the two countries. Much more remains to be learned from Canadian examples. The two principal recommendations were to restructure the process of environmental planning and assessment to better exploit the opportunities for negotiation; and to establish measures to improve the interactive skills of participants.

Commentary 1: McTaggart-Cowan noted that the theme paper set environmental negotiation in the context of today, but not necessarily in that of tomorrow. Care must be exercised in institutionalizing negotiation and particular attention should be directed toward clarifying the objectives this approach is intended to serve. The administrative discretion and flexibility inherent in Canadian decision processes facilitates negotiation. Environmental professionals are often called upon to play mediatory-type roles, although this is often not obvious to outsiders. The institutionalization of such informal processes may actually impede conflict resolution. Proposed changes to EIA, such as the current emphasis on legislating the federal process, may have similar effects. The process should not become the product.

Commentary 2: A sober review of U.S. experience with environmental mediation was provided by Cormick. This approach was stated to be a growth industry only for academics, in that a considerable volume of literature has been produced based on a relatively small number of cases. Environmental mediation, in Cormick's words, has become "the darling of people who tend not to get involved in disputes." Given this tendency, Canadians need to look carefully at why negotiation makes sense. Conflicts may be seen as problems of communication/information, or as value-based issues. In the latter case, there are often no correct answers and in the former case, clarification may not help.

What Constitutes Negotiation? The discussion centered around the Dorcey and Riek classification of negotiation-based approaches in Canada, rather than on basic definitions of the nature and characteristics of this process (which were taken as read). It was agreed that the framework was a useful organizing device. Several questions, however, were raised about:

(i) the designation and relevance of particular case studies — Piette noted that the Quebec/New York Agreement of Formal Pre-notification Procedures for Development with Transboundary Impacts was a better example of a negotiated settlement than the 1982 compact on acid rain, and questioned the omission of the James Bay Agreement between Quebec and the native peoples of the region;

(ii) the simplification of certain forms of procedural and substantive negotiation — McTaggart-Cowan and Cotterill cited the example of the complex negotiations that took place jointly and separately between the federal and provincial governments and industry before, during, and after the environmental assessment panel review of West Coast offshore drilling; and

(iii) the lack of discrimination between different types of negotiation — an important distinction emerged between multi-party (i.e., government/industry/community interest sector) and bilateral (inter-governmental or government industry) processes. The focus of present discussion is on the former, rather than the latter area.

How do multi-party negotiations relate to the political culture of environmental decision making? The main barrier to multi-party forms of negotiation lies with the existing distribution of power. Within the Canadian political context, governments presently consult; they do not as a rule negotiate with environmental interest groups or local communities affected by their decisions. At present, a non-governmental organization (NGO) still lacks the leverage to bring governments to the negotiating table, although its political influence is considered substantial by many government agencies. The "creation of risk" for proponents or governments, through the exertion of political pressure, legal challenge, or recourse to the media, is a

currently underutilized approach for entering into direct negotiations on issues. A culture of public participation, however, has evolved, which provides the point of entry for experiments with negotiation. The catalyst is a certain degree of dissatisfaction with "one shot" hearing processes and an interest in developing smoother, more cost-effective procedures. Environmental and community interests, as well as government and industry, remain sceptical about entering into negotiation. They fear co-optation: "if it becomes good for them, it becomes questionable for us" (Harvey, Gamble). All of this, finally, raises broad questions about how to secure the public interest and the contemporary role of government agencies in this process.

Which types of environmental conflict yield to negotiation? Multi-lateral negotiation of environmental conflict occurs most evidently and explicitly at the project level. This is where the process can be most constructively employed. Siting conflicts, however, are often about whether, rather than just where or how, development should proceed in the light of other alternatives potentially available. The former issue involves fundamental questions of need and justification, which proponents and governments usually consider to be non-negotiable, and environmental interest groups and local communities consider to be of paramount importance. In this context, there are concerns about the status of those who are "unalterably opposed to projects and may stall the process." The general sense of the round table was that the nature and management of risk and impact can be resolved through carefully structured negotiations between government, industry, and directly effected publics. A prior order settlement of broad, value-based conflicts is necessary if this process is to work properly.

THEME II: THE PLACE OF NEGOTIATION IN EIA

Opening Statement: Emond strongly emphasized the distinction between negotiation and mediation as an alternative or adjunct to EIA processes. Using the example of the Ontario environmental assessment process, the questions generated by the application of negotiation within "the shadow of the Board" were discussed. The presence of the Ontario Environmental Assessment Board (OEAB) provides a mixed incentive to negotiate. It is in a proponent's interest to negotiate with environmental interest groups who have previously intervened successfully with the Board; yet, paradoxically their very track record may discourage them from entering into this process and straying from the familiar confines of the hearing tribunal. The Board's own record of decision making, Emond argued, also shapes the conduct of any negotiation process. Given that the Board has approved 99% of the proposals brought before it, there is an obvious predisposition in favour of the proponent. This indicates the problems of bias encountered with linking negotiation processes to the existing system.

Commentary 1: A counter view of the shortcomings of negotiation in relation to the hearing tribunal was given by Jeffery. Public hearings, in his view, protect the wider public interest better than multi-party negotiations. The OEAB, for example, has a statutory duty to protect the environment and consider the public interest in so doing. Negotiation processes do not have adequate safeguards to secure either standard. The Board, accordingly, would have to examine any negotiated settlement to see that it meets public interest criteria. Within this framework, negotiation with or without the benefit of a third-party mediator should not be seen as an option to a formal hearing. It is most useful at the early phase of scoping issues. As such, it may become part of the pre-hearing conference procedures that take place under the auspices of the Board. The Board, however, must not become involved in the conduct of negotiation to avoid conflict of interest with its adjudicatory role in any subsequent hearing.

Commentary 2: The environmental hearings conducted by the Quebec Bureau d'audience publiques differ in character from those of the Ontario model. As reported by Beauchamp, they constitute an important political event that permits discussion of underlying values and the strategic context of specific proposals. The Bureau has experimented with pre-hearing "negotiation" of issues. At present, experience is too limited to draw firm conclusions. The role and contribution of negotiation is still open to determination. It is likely, however, that hearings will continue as the central mechanism for public input and education (which was noted as being an undervalued aspect of the process).

At which stages in the EIA process are negotiations most appropriately employed? In this context, negotiation should be viewed as a tool for problem solving, for enhancing the effectiveness and efficiency of impact analysis and decision making. The use of this approach in pre-hearing scoping of issues was endorsed as having particular benefits. At present, for example, considerable time and effort is spent before the OEAB in retroactive arguments over these provisions. Early and timely resolution of the scope and focus of impact analysis would make for a more efficient process, and meet major reservations held by public interest groups concerning the relatively late stage at which interventions can influence events. Other potential areas where negotiation can help include the predetermination of mitigation and compensation measures and post-approval revisions on the basis of actual, rather than predicted, impacts. At all three stages — scoping, mitigation, and implementation — the scale of the issue may have an important bearing on the successful use of negotiation approaches. These work best with small localized disputes (e.g., between a public utility and several private landowners). However, there is a danger that negotiated settlements of such cases may be achieved at the expense of the interests of others.

How will the public interest be safeguarded in negotiated settlements? This was a fundamental issue around which much of the discussion was organized. At least three related groups of questions were touched upon:

- What are the comparative merits of negotiation versus adversarial processes in safeguarding the public interest.
- How should negotiation be conducted so that environmental values are not bargained away through "dollar diplomacy"?
- Who is responsible for ensuring that negotiated settlements meet the test of the public interest?

It was emphasized that hearings are organized to investigate and adjudicate problems; negotiations are meant to resolve disputes and are not bound by standards and regulations. The first test of voluntary negotiated processes and settlements is how they are viewed by the people affected by them. Where negotiations are part of an EIA process, there is a need for agreements to be reviewed and ratified by a panel or tribunal. This also makes them durable. Little clarification was forthcoming on the tests which might be applied by boards to determine if an agreement voluntarily and freely arrived at is in the public interest, except for the note *sotto voce* that this is the expertise to which they presently lay claim.

What should be the relationship of negotiations and public hearings? Public hearings conducted by a panel or board are seen as providing a safety net for the conduct of negotiation. Unless recourse to a hearing is available in the event of an impasse, NGOs will be hesitant to participate voluntarily.

The disposition of the hearing board becomes of critical importance in this respect. On occasion, the Alberta Energy Resources Conservation Board, for example, utilized negotiation in lieu of a traditional inquiry. The Board puts a cap on the process if it does not show significant progress and the issues are then dealt with by hearing and adjudication. A possible dilemma for proponents with this process is that they become suspect if they do not exercise the negotiation option. Their best interests, however, may be served by adjudication. If this is the case, the problem is transferred to the Board. The courts, however, were noted as taking active steps to encourage negotiation-type processes (e.g., in pre-trial conferences) without judicial integrity being compromised.

THEME III: ENSURING ACCOUNTABILITY IN THE CONDUCT OF NEGOTIATIONS

Opening Statement: The example of negotiated rule-making in the United States was used by McGlennon to discuss ways and means of building accountability into the negotiation approach. With the aid of a neutral mediator, this process supplements formal decision-making procedures required by law. It begins with the identification of relevant parties and their joint determination of the protocols for the conduct of negotiation. During the process, participants are responsible to the interests they represent; the sponsoring agency is accountable for meeting its legal and administrative requirements; and the mediator is responsible to all parties for managing the process within the agreed framework. Draft agreements then go through normal agency decision-making procedures.

Commentary 1: Millard basically agreed with the views expressed by McGlennon and Susskind on using alternative forms of dispute settlement to supplement environmental assessment and regulation processes. He described a negotiation process underway in Alberta that has many of the characteristics of U.S. practice in regulatory rule making. The standards for sulphur recovery by gas processing plants in the province are a longstanding source of dispute between government, industry, affected communities, and environmental interests. A recent review, undertaken by the provincial Energy Resources Conservation Board and Alberta Environment, is based on a collaborative process that encourages the parties to undertake joint fact-finding and reach a concensus on revised guidelines for sulphur recovery. The process is backed by provisions for learning and adjudication, in the event that agreement is not reached.

Commentary 2: Isaacs took the position that negotiation is the wrong place to start when trying to restructure EIA processes. Negotiation only has a role once traditional adversarial processes are operating effectively. When trust is lacking between parties, the use of negotiation is likely to worsen the situation and contribute to distrust. According to Isaacs, even the language we use is indicative of this problem. Witness the use of the term *environmental disputes* in the workshop background paper: there is no such thing, in Isaacs' view, as an environmental dispute! The focus on disputes, furthermore, is misplaced; we should be talking about environmental planning. Caution is also needed in comparing the Canadian and American systems. A "made in Canada" approach is needed and should build on success in facilitated consultation.

What are the enabling conditions for responsible and effective negotiation? Questions of accountability do not appear to be a major barrier standing in the way of the implementation of this process. This is said with due recognition of the limited experience to date with negotiation in Canada and the difficulty of transferring lessons learned in the United States. Much of the discussion in this respect focused on the enabling conditions for the conduct of responsible and effective negotiation. These may be paraphrased as follows:

- Negotiation is a voluntary process. A climate of trust is important to foster the willing participation of all interests. This is currently perceived as a problem in Canada, at least by NGO representatives.
- The parties to negotiation need to have sufficient influence and resources for their involvement to be taken seriously. In all likelihood, this means some kind of participant funding or support in kind for environmental interest and community groups.
- The negotiation process must be clearly linked to the EIA decision-making process to allow for the implementation of any agreement. A difficulty here will be the drafting of protocols for the direct or arms-length involvement of government agencies with authority to impose solutions.
- An independent third-party mediator will usually be necessary to facilitate more complex multi-party issues. He or she will need to be acceptable to all parties. On occasion, someone with special stature may be required to initiate the process (e.g., the appointment of Mr. Justice Hall in the Grassy Narrows Case.)
- The step-by-step procedures for screening the negotiability of a conflict, achieving representation of interest, involving the parties in the design of the negotiation process, and undertaking the conduct of negotiations are already reasonably well accepted. In practice, however, the identification of representatives was seen as a potential stumbling block in the Canadian context.

- The groundwork for the initial experimental phase with the use of negotiation needs to be laid extremely carefully. If negotiation is tried and fails, especially in vexatious circumstances, then the attempt may further erode trust.

How cost effective is negotiation? The cost effectiveness of undertaking multi-party negotiation is an important aspect when considering the application of this process. A concensus-seeking approach takes time. In the United States, for example, the average length of time taken to achieve a mediated settlement of reasonably complex environmental disputes is six to eight months. The cost for such an exercise can be in the order of $250,000 (U.S.). Environmental negotiation may not necessarily be cheaper or quicker than a traditional hearing. Undertaken as part of a hearing-based EIA review, this process may add to the time and cost, perhaps significantly. The cost effectiveness of this approach is thus a question mark until further evidence is available on Canadian applications.

THEME IV: FUTURE DIRECTIONS

A sense of the discussion: The general conclusion to be drawn from the round-table discussion is that negotiation-based approaches could provide a useful supplement to Canadian EIA processes. Specific opportunities that exist at different stages of the process have been identified in the background documents and in the synopsis of the dialogue. These include scoping of issues, the design and mitigation of compensation measures, and their subsequent revision. It is also apparent that a number of concerns, notably about the cost effectiveness of negotiation, remain unanswered. A cautious approach to the future promotion of this process is thus in order, especially if larger, more costly environmental mediation exercises are being entertained. On balance, however, the use of negotiation certainly merits continued scrutiny and further testing.

Where do we go from here? And how can research and development help? The use of demonstration projects shows particular promise for advancing our understanding in support of EIA. Such an approach has obvious benefits (and builds from an area of interest already being pursued by CEARC). It is also recognized, however, that identifying candidate projects for monitoring and evaluation is easy to call for, more difficult to secure. Negotiation is a confidential process that deals with controversial issues. Both the parties or the sponsoring agency may be reluctant to open the course and conduct of the process to independent scrutiny and documentation. The alternative is to rely on the case studies coming from involved parties or mediators themselves (which some participants consider may be self-serving) or on second-hand appraisal. For those interested in research and development, the question is how much more of value can be gained from derivative analyses of negotiation, as opposed to learning from doing. The concluding sense of the workshop was weariness on the first count and wariness on the second!

CONCLUSIONS AND RECOMMENDATIONS

The SIA Committee of CEARC developed several conclusions and recommendations based on its evaluation of the proceedings of the Toronto workshop.

Our main conclusions are the following:

1. Negotiation-based approaches offer a promising means of dispute settlement, one that extends the range of options on which decision makers presently rely.

2. These approaches can be usefully applied within the context of EIA provided certain preconditions are met, notably:

   (i) the dispute is confined to a limited number of interests that are significantly affected;

   (ii) the issue does not involve major policy precedents and/or does not involve fundamental clashes of values or principles;

   (iii) the proposed participants have indicated their willingness to negotiate in good faith to achieve a mutual accommodation of their interests; and

   (iv) most importantly, the agency with final responsibility for decision making is prepared to support the process and the participants in setting the ground rules for the conduct of negotiation.

3. Scale is of particular importance when considering the potential benefits of negotiation and in evaluating the issues that may yield to this approach. When discussing the pros and cons of negotiation, there is a tendency to focus on high-profile mediation of complex issues. This is understandable, but much of the value of using negotiatory approaches in the context of Canadian EIA processes may rest in small-scale applications; for example, the determination of mitigation and compensation measures.

The recommendations that follow are concerned with promoting and supporting an experimental approach to improving the settlement of disputes within EIA.

1. Responsible federal and provincial agencies should critically analyse the value of incorporating negotiation within their particular jurisdiction. The opportunities for and constraints on this approach are contingent upon the frameworks of assessment that are in place. Whether the process has a legal or administrative basis, for example, may affect the scope and opportunity for use of negotiation. The use of negotiation will depend most of all on the organizational culture of decision making, the prevailing modes of thinking and behaviour that guide expectation and shape attitudes to innovation.

2. Further documentation and case analysis of Canadian experience is needed to support institutional experiments with the role and conduct of negotiation. These should focus on small-scale direct negotiations, as well as more visible environmental mediation exercises. It may be particularly instructive to learn how such processes are presently linked to decision making within EIA and project review. Much of the emphasis in the literature is currently placed on the role and contribution of mediators and what they do. While this is useful, EIA administrators and practitioners need to understand more about other aspects of practice, perhaps more appropriate to their everyday problems.

3. Several disputes should be selected and monitored as management experiments in environmental negotiation and mediation. This approach should ideally be coordinated by an advisory committee established under the auspices of the Canadian Council of Resource and Environment Ministers (CCREM). With the agreement of responsible agencies, candidate cases might be selected on the basis of regional location, type of dispute, including whether or not third-party mediation is involved, the range of interests at stake, and the nature of the institutional framework (whether legal or policy-based). The purpose of such projects will be to develop realistic insights into the operational difficulties and opportunities for applying alternative means of dispute settlement in support of EIA and project review.

APPENDIX I

BUILDING MEDIATION INTO THE FEDERAL ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS

Barry Sadler

INTRODUCTION

The papers and discussions in this volume indicate both the incentives and constraints to applying negotiation in support of environmental assessment in Canada. By design, the proceedings are wide-ranging and cover experiences and examples from a number of jurisdictions. It may be useful, accordingly, to support this review of the place of negotiation in environmental assessment with a case study of the issues encountered when considering the use of alternative means of dispute settlement within a particular system.

A possible strategy for building mediation into the federal Environmental Assessment and Review Process (EARP) will be used for this purpose. It incorporates guidelines on why and how this approach might be employed to improve environmental decision making and problem solving. The framework of ideas outlined in this appendix was initially drafted as part of a briefing note prepared for a Working Group of the Interdepartmental Committee on EARP charged with looking at ways and means of improving and supplementing panel reviews.[1] It represents an attempt to give a particular shape and substance to the suggestion made in the Discussion Paper on EARP reform that a negotiator might be appointed in lieu of a panel under certain circumstances (FEARO 1987a:17).

The following discussion is organized in four parts:

a) a brief profile of EARP that incorporates the rationale for mediation;

b) a statement of the potential role and relationships of mediation within the review phase of the process;

c) a description of proposed principles and procedures for the conduct of this approach; and

d) a recommended strategy for the design and implementation of environmental mediation.

POLICY AND INSTITUTIONAL BACKGROUND

EARP is well documented. Policy and operations are described in various publications issued by FEARO (e.g., 1986, 1987b). In addition, the process is the subject of a growing critical literature. Although much of the writing tends to be rhetorical in tone and unilateral in perspective, there are widely shared concerns about the accountability and effectiveness of a process directed by policy rather than based in law. These concerns have continued despite (or perhaps because of) various administrative reforms designed to alleviate them.

Since 1974, when EARP came into force, procedure and practice have developed in an incremental, pragmatic manner on the basis of case experience. The course of change is reflected in a series of process revisions and adjustments. At present, the application of EARP is governed by the 1984 Guidelines Order. Further proposals for process reform, however, are currently before Cabinet. These are based on a comprehensive process of public consultation, which culminated in a National Workshop on Federal Environmental Assessment Reform (FEARO 1987a, 1988). There was a broad consensus at the Workshop on the necessity for fundamental improvements to the process.

For present purposes, only certain points need to be noted about the issues under review, proposed improvements, and the imperatives shaping them. These begin with the current organization of EARP into two distinct phases:

- initial assessment of federal projects and activities, which is undertaken by government agencies responsible for executing or sponsoring them; and
- public review of large-scale proposals with potentially significant environmental effects, which is undertaken by independent panels.

Much of the criticism voiced about initial assessment focuses on what may be termed errors of ommission: a perceived lack of accountability and transparency in a process that is largely internal to government bureaucracy. The grounds for concern about panel review, by contrast, may be categorized as errors of commission, i.e., they relate to the efficiency and fairness of public processes and their role and relevance in project decision making. Less well realized perhaps is the fact that the two sets of problems are structurally inter-related.

Initial assessment and public review processes tend to function independently rather than interdependently; there is no middle ground to bridge the gap between them. As hinted above, initiating agencies are reluctant to refer proposals to independent panel review unless it is absolutely necessary, yet these agencies have a mediocre record, at best, in dealing with the public and resolving conflict. This becomes problematic with respect to a certain discrete category of proposals usually

1 This draft was prepared under the terms of contract number KA605-5-0005, which calls for the provision of scientific and policy advice to the Federal Environmental Assessment Review Office (FEARO). I am indebted to members of the Interdepartmental Committee's Working Group and especially the Chairman, C.D. Robertson of FEARO, for comments and assistance in developing this material. This present expanded version reflects my own views, which are not necessarily those of the Interdepartmental Working Group, FEARO or members of its staff, or CEARC and its committees.

referred to as Not-In-My-Back-Yard (NIMBY) issues. In the context of EARP, these may be characterized as "medium-scale" proposals that generate controversy, and lie beyond routine, technically based assessment, but which are not necessarily automatic candidates for panel referral.

The crux of the issue here, from a process perspective, is the lack of alternatives for dealing with issues that fall into this intermediate category. The preparation of an initial environmental evaluation (IEE), when viewed in a decision-making context, represents an extended form of initial assessment. It leads to *clarification* of the basis on which a referral is made or not made, rather than a *resolution* of NIMBY issues. Such issues typically are resistant to conventional approaches because they are socio-political rather than technical in nature, coloured by perceptions of risk and apprehensions of impact on health and lifestyle. They constitute a major challenge for process development, whether undertaken as part of a comprehensive reform of the system or pursuant to specific amendments to the EARP Guidelines Order.

A ROLE FOR MEDIATION?

The range of choice open to initiating agencies in handling NIMBY-type issues provides a context and rationale for exploring a role for mediation in the federal EARP. A mediation track, along the general lines sketched in Figure 1, will provide the Minister of the Environment and an initiating minister with an alternative route to full-scale panel review. It permits a more discriminating approach to dealing with medium-scale, controversial, NIMBY-type proposals than is currently possible. This approach, ideally, should form part of a larger strategy for dispute settlement in EARP, one in which a "tool kit" of mechanisms is available to cope with the different configurations of conflict typically encountered as part of the federal government's development activity. For present purposes, however, the appointment of a mediator will be discussed solely as a supplement to the panel review process.

The point of departure for analysis is the role for the "negotiator" set out in the EARP Discussion Paper (see Figure 1). While not explicitly stated, the assumption seems to be that the negotiator will be a neutral third-party charged with facilitating a process of dialogue and accommodation among the interests affected by a proposal. The term that best describes this process is mediation, although approaches such as arbitration and conciliation represent potential alternatives within an EARP framework (see Table 1 for definition of terms).

Environmental mediation has proved reasonably effective in the United States in resolving the siting of unwanted facilities and related NIMBY issues. This approach also appears to be capable of adaptation to other political cultures and institutional arrangements. It can improve the productivity and effectiveness of environmental decision making in Canada (Haussmann 1984; Shrybman 1984). As such, mediation should be of interest to proponents, intervenors, and initiators alike. Several past reviews by environmental assessment panels may have lent themselves to mediation. This approach may also be suited to a number of proposals pending under EARP. A checklist of examples, compiled from inputs by officials of FEARO and other agencies, is set out in Table 2. This list represents only a very rough and cursory screening of past and present possibilities for employing mediation in EARP. It was drawn up, for example, on the basis of general responses and without reference to specific criteria of mediability. During the course of this and related discussions, a number of concerns about the possible use of mediation within EARP were also raised.

Table 1

Definition of Terms

Consultation is a process of two-way communication by which people are informed about proposals that may affect them, and have the opportunity to express their views and concerns prior to final decisions being taken.

Negotiation is a voluntary collaborative process of problem solving in which parties to a dispute try to reach a mutually acceptable, workable solution to their differences through direct, face-to-face dialogue.

Mediation is a process of negotiation conducted with the assistance of an impartial third party who has no power to impose a solution on the disputants.

Arbitration is a quasi-negotiated process in which an impartial third party renders a decision that is generally binding on the disputants.

As Figure 1 indicates, the proposed development of a negotiation or mediation track in EARP is, first, contingent upon the implementation of a mandatory IEE and, second, does not preclude the subsequent referral of the issues being negotiated to an independent panel. Although bureaucratically convenient, the former condition appears, *prima facie*, to be too restrictive. The option for the minister of an initiating agency in consultation with the Minister of the Environment (or vice versa?) to appoint a mediator could occur equally well at other key points in the process. It may prove useful, for example, to develop criteria for screening the mediability of issues (comparable to the list of projects for automatic referral for panel review). The thrust of discussion in this volume confirms the value of having a panel review as a "safety net" in cases where mediation is unsuccessful. A strategy for this eventuality should also be in place, so that mediation, at a minimum, becomes a scoping process that leads to pre-clearance and clarification of the issues subsequently put before an environmental assessment panel.

The main reservations expressed by federal officials about mediation turn on the nature of the process and the fact that it differs in kind rather than degree from conventional panel reviews. Round table negotiations, by necessity, are restricted to representatives of the interests in dispute and certain aspects of the process are usually closed and confidential. This process, moreover, is structured to lead to the parties themselves reaching a mutually acceptable settlement of the issues, rather than leaving it to a panel to weigh and adjudi-

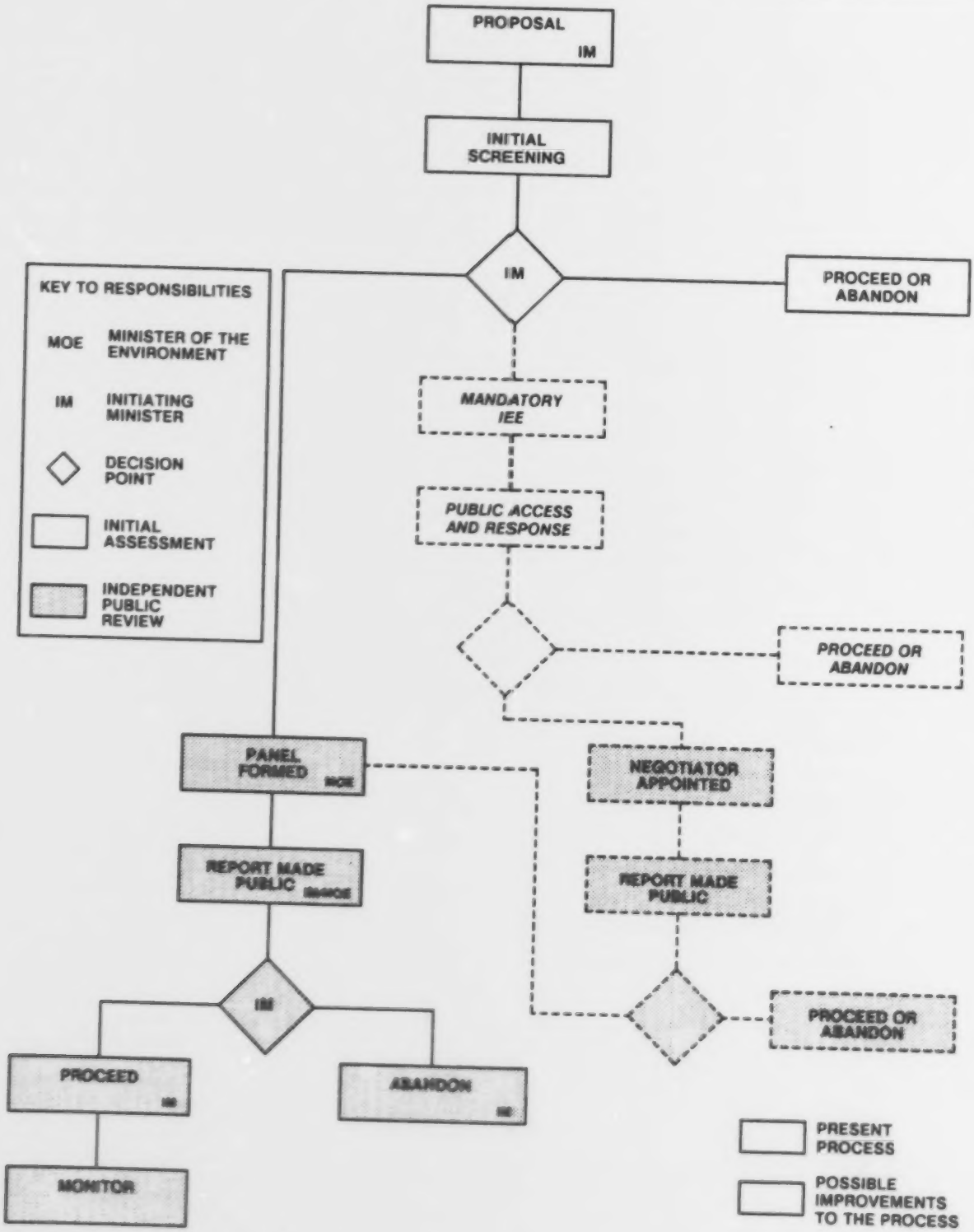

Figure 1: Proposed Reforms to the Federal Environmental Assessment and Review Process: The Place of Negotiation

Table 2
Projects Referred for EA Panel Review — Suitability for Mediation

Project	Not Suitable	Suitable
Nuclear Power Station, Pointe Lepreau, New Brunswick (1975)	•	
Hydroelectric Power Project, Wreck Cove, Cape Breton Island, Nova Scotia (1977)	•	
Alaska Highway Gas Pipeline Project, Yukon Territory (1977)	•	
Eldorado Uranium Refinery Proposal, Port Granby, Ontario (1978)	•	
Shakwak Highway Project, Yukon Territory — British Columbia (1978)	•	
Eastern Arctic Offshore Drilling, South Davis Strait Project, Northwest Territories (1978)		•
Lancaster Sound Offshore Drilling Project, Northwest Territories (1979)	•	
Eldorado Uranium Hexafluoride Refinery, Ontario (1979)	•	
Roberts Bank Port Expansion, British Columbia (1979)	•	
Alaska Highway Gas Pipeline, Yukon Hearings, Yukon Territory (1979)	•	
Banff Highway Project (east gate to km 13), Alberta (1979)	•	
Boundary Bay Airport Reactivation, British Columbia (1979)		•
Eldorado Uranium Refinery, R.M. of Corman Park, Saskatchewan (1980)	•	
Arctic Pilot Project (Northern Component), Northwest Territories (1980)	•	
Lower Churchill Hydroelectric Project, Northwest Territories (1981)	•	
Norman Wells Oilfield Development and Pipeline Project, Northwest Territories (1981)	•	
Alaska Highway Gas Pipeline (routing alternatives Whitehorse/Ibex region), Yukon Territory (1981)	•	
Banff Highway Project (km 13 to km 27), Alberta (1982)		•
Alaska Highway Gas Pipeline (final report), Yukon Territory (1982)	•	
CP Rail Rogers Pass Development, British Columbia (1983)		•
Venture Development Project, Nova Scotia (1983)	•	
Beaufort Sea Hydrocarbon Production and Transportation (1984)	•	
Port of Quebec Expansion Project, Quebec (1984)	•	
CN Rail Twin Tracking Program, British Columbia (1985)	•	
Second Nuclear Reactor, Point Lepreau, New Brunswick (1985)	•	
Hibernia Development Project (1985)	•	
Fraser Thompson Corridor Review (1986)	•	
West Coast Offshore Hydrocarbon (1986)	•	
Port Hope Low Level	•	
Goose Bay Low Level	•	
St-Jean Airport Ground Level		•

Table 3
Positional Bargaining vs Principled Negotiation

Positional Approaches		Principled Approach
Hard	Soft	
Participants are friends.	Participants are adversaries.	Participants are problem solvers.
The goal is agreement.	The goal is victory.	The goal is a wide outcome reached efficiently and amicably.
Make concessions to cultivate the relationship.	Demand concessions as a condition of the relationship.	Separate the people from the problem.
Be soft on the people and the problem.	Be hard on the problem and the people.	Be soft on the people, hard on the problem.
Trust others.	Distrust others.	Proceed independent of trust.
Change your position easily.	Dig in to your position.	Focus on interests, not positions.
Make offers.	Make threats.	Explore interests.
Disclose your bottom line.	Mislead as to your bottom line.	Avoid having a bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.	Invent options for mutual gain.
Search for the single answer: the one they will accept.	Search for the single answer: the one you will accept.	Develop multiple options to choose from; decide later.
Insist on agreement.	Insist on your position.	Insist on objective criteria.
Try to avoid a contest of will.	Try to win a contest of will.	Try to reach a result based on standards independent of will.
Yield to pressure.	Apply pressure.	Reason and be open to reasons; yield to principle, not pressure.

Source: Fisher and Ury (1981:13).

cate among contending interests and inputs. With respect to the first characteristic, there are grounds for concern that this approach may jeopardize the credibility of a process that is traditionally open to all interested participants who wish to voice their concerns. Second, there are fears that any "agreement" reached may not be in the public interest.

Both concerns demand careful consideration. The second objection is perhaps more easily dealt with than the first. Under the process set out in Figure 1, the mediator reports to the Minister of the Environment and the minister of an initiating agency. As with a panel review, the final "choice" of accepting, rejecting, or modifying a recommended solution rests with elected officials. The possibility that the public review process will be compromised by direct negotiation between parties to a dispute is more complicated. In the final analysis, the wider process implications of incorporating a mediatory track within EARP can only be judged in relationship to the principles and procedures employed.

PRINCIPLES AND PROCEDURES FOR THE CONDUCT OF MEDIATION

A sufficient body of experience with mediated negotiations of environment and development disputes is available to provide reasonably clear guidance on the conduct of this process. In general terms, the basic methods of principled negotiation are widely employed rather than the more pervasive form of positional bargaining that is an implicit feature of traditional processes of conflict resolution and decision making (see Table 3). The application of this approach to EARP, of course, can assume varying forms. Broad-brush proposals for mediated negotiations are made to illustrate the nature of the process and its relationships to existing review structures. It will be useful to begin with first principles.

Basic Principles

There are four propositions of principled negotiation (Fisher and Ury 1981):

- separate people and their personalities from the problem;
- focus on basic interests, not stated positions;
- create a range of options that reconcile interests; and
- chose a solution based on agreed objectives and criteria (e.g., market values, scientific judgement).

These propositions amount to a frame of reference for structuring the mediation track of EARP. (They also, in passing, afford some interesting comparisions with the present characteristics of public review.)

Principled negotiations are often conducted with the assistance of a neutral third party or mediator. This individual must be both acceptable to and independent of the parties to a dispute. His or her responsibility is to assist them in their efforts to reach a mutually acceptable settlement of their differences. The mediator focuses on the process of negotiation and settlement rather than the substance of the dispute. In this capacity, he or she will act in several capacities:

- convener of meetings to define the terms and conditions for the process;
- broker of ideas and interests among parties; and
- facilitator of ongoing discussions at the negotiating table.

A mediator, in contrast to an arbitrator, has no authority to impose a solution nor to recommend a course of action in the event of negotiations becoming deadlocked.[2]

Finally, it should be recognized that mediation is an informal, voluntary process of consensus-seeking. No party is forced to accept a solution against its better judgement. While bargaining "in good faith" is an important prerequisite of principled negotiation, the option remains for parties to withdraw at any point in the process. Reasons may include, for example, a lack of commitment by the constituency represented to the course of solutions that are unfolding. In such cases, there is always the possibility that the process of negotiation may backfire and increase conflict and mistrust. A well-designed and carefully administered process with agreed criteria and procedures, however, can work to minimize these risks.

Supporting Criteria and Rules of Procedures

Environmental mediation is usually a three-stage process. It involves:

- pre-negotiations to lay the groundwork for the conduct of the process;
- substantive negotiations to try and reach agreement; and
- post-negotiations to empower the implementation and enforcement of the agreement.

At each of these phases, there are tried and tested supporting criteria and rules of procedure for applying the basic principles outlined previously (see, for example Susskind and Cruikshank 1987). There is, however, no standard recipe for mediated negotiation; instead, each process must be custom-tailored to the issues, interests, and institutions involved; and the cardinal rule is for the parties themselves to establish the protocols and the agenda of negotiation (Cormick 1985). Bearing this in mind, a five-step process is proposed for building a mediation track within EARP.

Step 1: Screening the Issues The type of circumstances under which mediation may be tried within EARP (outlined above) lend themselves to preliminary identification. Each process that falls within this category, however, will require further dispute assessment. Several questions need to be asked to determine the appropriateness of mediation. These are related to:

- the nature and dynamic of the dispute;
- the number of interests and parties directly or indirectly involved; and
- their relationships and motivation to participate in negotiations.

As a rule of thumb, mediation should not be established when:

- fundamental values underlie the dispute;
- important precedents for public policy ride on the outcome; and
- the number of identifiable interests appears to be large and diverse (see step 2).

In such cases, referral for panel review or decision by the responsible agency following clarification of views and issues through public consultation is the preferred option.

The timing of mediation is the focus of considerable discussion by theorists and practitioners of dispute settlement. Some experts claim that mediation should come into play only when conflict becomes intensified. Others argue that mediation can be employed before positions harden to avert and manage conflict. The balance of incentives and constraints with respect to the timing of mediation must be assessed in the context of the structure and dynamics of particular disputes.

Step 2: Identification of Interests and Recruitment of Representatives This is a critical step in the mediation process. It is one of the axioms of sound practice that all relevant parties must be at the negotiating table; otherwise, the value of the process is compromised and the chances of reaching an implementable agreement are reduced. At the same time, the nature of the process means that only a small number of people can participate. The identification of interests often creates problems with respect to complex, multi-party issues.

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2 This latter variant, a sort of one person mediator-cum-commissioner of inquiry may suggest itself as a typically Canadian compromise to the issues raised when considering the incorporation of a mediation track within EARP. It will probably offend the advocates of alternative forms of dispute settlement, but should not be dismissed out-of-hand as unworkable. As far as I am aware, however, there is no comparable model elsewhere.

Given the proposed role of mediation in EARP, the identification of interests should not prove to be an unduly complicated exercise. It will, however, likely involved distinguishing between directly and indirectly affected interests and deciding how these parties are to be represented at the negotiating table (i.e., sorting out who needs to be at the table, and who needs to be kept informed). For organized interests, the selection of a representative should be reasonably straightforward. The participation of community-based interests, which tend to be more diverse and issue-dependent, may be secured through coalition-building (or may require the designation of a public trustee).

Whether or not such permutations are necessary, the notion that constituencies of interest are represented in negotiation by a handful of people may prove to be an obstacle to the acceptance of the process within EARP. The widely promoted value of the panel review process is that it is open to each individual to participate (although students of the field recognize that the opportunity and the reality of public involvement are often quite different things). Certain procedures, such as specifying that formal negotiation sessions are to be open rather than closed events may partially alleviate concerns about compromising traditional process values. At the same time, this requirement could increase the difficulties associated with mediated negotiation and diminish the likelihood of success (as measured by the achievement of an agreement). In the final analysis, these trade-offs represent a policy call that can only be made against the broader framework of EARP objectives and values.

Step 3: Drafting the Rules of the Game A mediatior is usually selected at this point. Some form of facilitation will likely have been necessary to support the completion of the first two stages. Under the terms of EARP, this would likely involve someone appointed by the Executive Chairman of FEARO or one of his senior staff members. This individual may or may not continue in the capacity of mediator: the key criterion for this position is that the incumbent enjoys the confidence of all parties to the negotiation and serves at their pleasure. Accordingly, it is only when this group is in place that the mediator can be formally appointed.

His or her first and perhaps most important task is to work with the parties to draft the protocols that will govern the conduct of negotiations. This phase tests the ability of the parties to work together. By focusing on the process for the settlement of their differences, rather than on the issues themselves, the mediator and the negotiators have an opportunity to build confidence through reaching understanding on neutral matters before tackling divisive ones. The agreement on procedures would normally cover a range of topics: roles and responsibilities of the parties and the mediator; rules of confidentiality and release of information and reporting back to constituents; and the form and nature of the recommended agreement, which will be forwarded to the responsible ministers.

Other matters to be settled at this stage include the timetable for negotiation and the resources necessary to support the process. Both the timeframe and budgetary allocations may be prescribed in general terms at the initiation of negotiations. It is quite likely, however, that the parties themselves will set their own deadlines and contingencies. Similarly, the augmentation and reorganization of budgetary allotments and allocations may be requested. All of these matters form part of the grist of joint problem solving.

Step 4: Facilitating Agreement At this stage, the parties to a dispute get down to the real business. The emphasis in mediated negotiations is on ensuring that the disputants work through the substantive issues in an orderly, focused, and creative manner. It is the job of the mediator to ensure, through a judicious blend of consultation, chairmanship, and cajolery, that the discussions do not become unproductive and that representatives maintain links with their constituencies. Much effort may have to be expended to ensure that the parties continue in the principled negotiation mode and do not lapse into confrontational bargaining. When the latter occurs, the process can quickly become derailed and degenerate into confrontation.

The approach usually followed to try and ensure that negotiations are purposive and productive involves these activities:

- establishing the agenda of issues to be discussed (which problems are to be tackled and in what order);
- identifying information requirements, including the terms of reference for independent consultants and opportunities for joint fact-finding;
- working toward a single negotiating text to focus the discussions;
- packaging the alternatives for mutual gain so that important interests are considered and accommodated when formulating proposals (rather than the parties becoming deadlocked over specific issues); and
- finalizing the agreement, which will usually involve a full review of the terms of a proposal with the communities and organizations involved.

Within the context of EARP, the relationship of this process to the requirements for an IEE or similar documents will need to be carefully worked out. Mediated negotiations can both extend and are empowered by technical analysis of project impacts and mitigation and compensation options. When the IEE is a trigger for this process, the document can serve as a basis for the joint determination of further information requirements (see the second point above). In the reverse case, the IEE might be organized to explicitly focus on areas where matters of fact and technical interpretation are in dispute. The impact statement might then be envisaged as a consolidated document, outlining areas of and grounds for agreement and disagreement. Such an approach should set the stage for focused and productive discussion (it also contains a number of features that may lend themselves to the scoping phase of a full-scale panel review).

Step 5: Implementing the Agreement The mediation process does not conclude when agreement is reached. A post-negotiation phase of activity follows. It encompasses monitoring the implementation of the agreement (i.e., the

compliance of the parties) and, if necessary, modifying sections of it. The terms of an agreement will usually include mechanisms for this purpose and provisions for renegotiation.

Given the uncertainties typically associated with impact assessment, it is inevitable that certain understandings will be contingent upon further information and circumstances. Mitigation and compensation measures, for example, can be linked to actual (monitored) as opposed to assessed (predicted) impacts. It is not always easy, however, to disentangle cause and effect. Where surrounding circumstances also change and impinge on understandings, the parties may wish to mutually (or unilaterally) revise all or part of the package of impact offsets.

Because mediated negotiations are a voluntary consensual process, it is in the interest of the parties to link any agreement to the institutions and individuals with responsibility for formal implementation (i.e., with decision-making powers). Within EARP, this relationship is specified in Figure 1. The mediator is required to report to the Minister of the Environment and the minister of an initiating agency. Where an agreement has been reached by the parties, the expectation would be that this will constitute the substance of the mediator's report. In the event of an impasse, the mediator could include recommendations that might be helpful in subsequent sequences of dispute settlement. The final responsibility for acceptance of the agreement and the determination of whether it is in the public interest rests where it should in a parliamentary democracy with responsible ministers.

A PROPOSED STRATEGY FOR PROCESS DEVELOPMENT

The case of building a mediation track within EARP along the lines discussed above seems to be worth further serious consideration by FEARO and initiating government agencies. On balance, the potential benefits appear to outweigh the drawbacks. It is also clear, however, that the pros and cons will be differently weighed by others depending upon their affiliation and experience. Environmental interest groups, for example, are apprehensive of co-optation. Federal bureaucracies, by contrast, may perceive the negotiation process as an erosion of turf or a devolution of their powers and prerogatives of decision making. Many objections in this area, moreover, are not easily deflected since the role and place of public servants in mediated negotiations is not clear before the fact. In the final analysis, the implications and issues associated with building a mediation track within EARP will only become clarified during the course of process design and implementation.

With this in mind, a phased strategy of process development is proposed once a decision in principle is taken by the responsible agencies to proceed with mediation.

1. A round table on the principles and procedures for mediated negotiations should be convened by FEARO using the mechanism of the Interdepartmental Committee on EARP and drawing on a leavening of non-government expertise from industry and the environmental sector. The results of these discussions should be circulated for public scrutiny and comment.

2. Following this review, the co-operating agencies should select a pilot project from among a preliminary list of candidate proposals suitable for mediation. The design, implementation, and results of the process should be subject to careful monitoring and evaluation to draw-out the lessons for future initiatives.

3. Obviously, early initiatives in the area will be crucial to the longer-term success of mediated negotiations in EARP. The selection of a mediator will be particularly critical and must be handled very carefully. At present, there are only a handful of people in Canada with experience in facilitating multi-party environmental negotiations, although there is reportedly no shortage of mediators-in-waiting of various persuasions.

4. The first order of business in applying mediation within EARP will be to establish a short-list of pre-qualified mediators who could be drawn from within and outside of government. A sizable reservoir of applicable skills, for example, exists within the field of labour negotiation and mediation. These and other talents, including FEARO and staff with experience in dispute assessment, public consultation, and facilitation, can be harnessed and focused through a combination of orientation and training. Mediated negotiations, in the final analysis, will represent a commitment to creativity in problem solving and require an investment in human resources. These are not the normal currencies in which bureaucracies deal, but then EARP is an atypical process.

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